Volume I

CONSOLIDATED APPENDIX — PARTS A and B

In The

Supreme Court of the United States

October Term, 1969

No. [redacted] 78

Atlantic City Electric Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

Jurisdictional Statement Filed January 16, 1970

No. [redacted] 106

Alabama Power Company, et al.,

Appellants

v.

United States of America and Interstate Commerce Commission, et al.,

Appellees

On Appeal from the United States District Court for the District of Columbia

Jurisdictional Statement Filed March 5, 1970

Probable Jurisdiction in Both Cases Noted, and Cases Consolidated for Argument May 18, 1970

CONSOLIDATED APPENDIX

IN THE

Supreme Court of the United States

October Term 1969

INDEX TO CONSOLIDATED APPENDIX

Volume I

Part A

PAGE

#1083—ATLANTIC CITY ELECTRIC CO., ET AL *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Documents Relevant to the Proceedings in the U. S. District Court for the Southern District of New York 1a

Part B

#1283—ALABAMA POWER COMPANY, ET AL *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Documents Relevant to the Proceedings in the U. S. District Court for the District of Columbia 169a

Volume II

Part C

RELEVANT DOCUMENTS FROM PROCEEDINGS BEFORE INTERSTATE COMMERCE COMMISSION, INCREASED FREIGHT RATES 1968, EX PARTE 259 ..... 224a

No. 1083

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX TO VOL. I—PART A

ITEM NO.		PAGE
—	Chronological List of Relevant Docket Entries	1a
1	Plaintiffs' Complaint dated February 28, 1969	3a
3, 4	Motion of Class I Railroads of United States to intervene, memorandum in support thereof and proposed answer, dated April 24, 1969	10a
5, 11	Motion of State of New York and Departments of Agriculture of States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts to Intervene and proposed complaint dated April 29, 1969	33a
7	Answer of Defendant Interstate Commerce Commission dated May 2, 1969	45a
8	Answer of Defendant United States of America dated May 7, 1969	48a

ITEM NO.		PAGE
10	Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the complaint of the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts dated May 8, 1969	49a
9	Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the answer of the Class I Railroads of the United States, dated May 8, 1969	50a
13	Motion of Plaintiffs for Appointment of Three Judge Statutory Court, dated May 22, 1969	51a
14	Statement of Position of Inferstate Commerce Commission on Plaintiffs' Motion, dated May 23, 1969	53a
16	Order of Hon. J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit designating members of three-judge statutory court, dated June 4, 1969	56a
17	Answer of Defendant Interstate Commerce Commission to the Intervening Plaintiffs' Complaint, dated June 19, 1969	57a
18	Motion to Dismiss Action by Defendant Interstate Commerce Commission and Memorandum in Support Thereof, dated July 8, 1969	60a
19	Memorandum of Railroads in Support of Defendant Interstate Commerce Commission's Motion to Dismiss, dated July 8, 1969	70a
21	Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint, dated July 28, 1969	88a

ITEM NO.		PAGE
22	Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss, dated July 28, 1969	116a
23	Reply Memorandum of Defendant Interstate Commerce Commission and of Railroad Intervenors in Support of Motion to Dismiss, dated August 4, 1969	133a
25	Opinion of Three Judge Court granting Interstate Commerce Commission's Motion, dated October 28, 1969	153a
26	Notice of Appeal to Supreme Court of United States, dated December 18, 1969	165a
—	Order noting probable jurisdiction, dated May 18, 1970	167a

No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX TO VOL. I — PART B

ITEM NO.*		PAGE
	Chronological List of Relevant Docket Entries	171a
16.	Amended and Supplemental Complaint (omitting Exhibits 1 and 2 which duplicate Items 52(I-27) and 52(I-30) in Part C of the Consolidated Appendix)	173a
17.	Answer of intervening defendants Aberdeen and Rockfish Railroads, et al., to the Amended and Supplemental Complaint	186a
21. (Partial)	Amended and Supplemental Complaint of Intervening Plaintiff, the Secretary of Agriculture	192a
22.	Answer of ICC to Amended and Supplemental Complaint	204a
25.	Answer of the United States to the Amended and Supplemental Complaint and intervening complaint	207a

* References are to Item Nos. in Docket No. 1283.

ITEM NO.		PAGE
27.	Answer of the Aberdeen and Rockfish Railroad Company, et al. to the Amended and Supplemental Complaint of the Secretary of Agriculture	208a
28.	Answer of the ICC to the Amended and Supplemental Complaint of the Secretary of Agriculture	211a
57.	Opinion of the District Court (with dissenting opinion, Wright, J.)	213a
59.	Judgment of the District Court	220a
60.	Notice of Appeal	221a
—	**Order Noting Probable Jurisdiction**	223a

Chronological List of Relevant Docket Entries

February 28, 1969—Plaintiffs' complaint filed in United States District Court for Southern District of New York

April 24, 1969—Class I Railroads of United States filed motion to intervene, memorandum in support thereof and proposed answer

April 29, 1969—Motion of State of New York and Departments of Agriculture of States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts to Intervene and Proposed Complaint filed

May 2, 1969—Answer of Defendant Interstate Commerce Commission filed

May 7, 1969—Answer of Defendant United States of America filed

May 8, 1969—Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the complaint of the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts signed

May 8, 1969—Order of Hon. Charles M. Metzner, United States District Judge, permitting the intervention and the filing of the answer of the Class I Railroads of the United States signed

May 22, 1969—Motion of Plaintiffs for Appointment of Three Judge Statutory Court filed

May 23, 1969—Statement of Position of Interstate Commerce Commission on Plaintiffs' Motion filed

June 4, 1969—Order of Hon. J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit designating members of three-judge statutory court signed

June 19, 1969—Answer of Defendant Interstate Commerce Commission to the Intervening Plaintiffs' Complaint filed

July 8, 1969—Motion to Dismiss Action by Defendant Interstate Commerce Commission and Memorandum in Support Thereof filed

July 8, 1969—Memorandum of Railroads in Support of Defendant Interstate Commerce Commission's Motion to Dismiss filed

July 28, 1969—Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint filed

July 28, 1969—Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss filed

August 4, 1969—Reply Memorandum of Defendant Interstate Commerce Commission and of Railroad Intervenors in Support of Motion to Dismiss

August 6, 1969—Oral argument held before Hon. Irving Kaufman, C.J., Hon. Dudley Bonsal, D.J. and Hon. Edward McLean, D.J.

October 28, 1969—Opinion of Three Judge Court granting Interstate Commerce Commission's Motion filed. So ordered

December 18, 1969—Notice of Appeal to Supreme Court of United States filed

December 31, 1969—Order of Hon. Edward McLean directing transfer of original record to the Supreme Court of the United States filed

Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ATLANTIC CITY ELECTRIC COMPANY, CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NIAGARA MOHAWK POWER CORPORATION, ORANGE & ROCKLAND UTILITIES, INC., PUBLIC SERVICE ELECTRIC & GAS COMPANY, ROCHESTER GAS & ELECTRIC CORPORATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

69 CIV. 800

Plaintiffs above named, complaining by their attorneys, LeBoeuf, Lamb, Leiby & MacRae, for their complaint herein allege:

1. Plaintiffs bring this action to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (hereinafter "ICC") of January 23, 1969 (hereinafter "the Order") which Order incorporates and makes a part thereof the interim order of the ICC issued November 26, 1968 in a proceeding held before it entitled "Ex Parte 259, Increased Freight Rates, 1968." Each of the above named plaintiffs was a party to the proceedings before the ICC which resulted in said Order and out of which the present action arises.

2. The jurisdiction of this Court is founded upon 5 U.S.C. § 703 and 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325. The United States of America is named as statutory defendant pursuant to 28 U.S.C. § 2322.

3. The above plaintiffs hereby petition this Court for the convening of a 3-judge court as required by 28 U.S.C. § 2325.

4. The plaintiffs herein are the following:

a. Atlantic City Electric Company is a public utility incorporated under the laws of the State of New Jersey, whose principal place of business is 1600 Pacific Avenue, Atlantic City, N. J. 08404, providing electric service to some 733,000 consumers in southern New Jersey.

b. Central Hudson Gas & Electric Corporation is a public utility incorporated under the laws of the State of New York, whose principal place of business is 284 South Avenue, Poughkeepsie, New York, 12602, providing electric service in the area of Central New York State to some 460,000 consumers.

c. Consolidated Edison Company of New York, Inc. is a public utility incorporated under the laws of the State of New York, whose principal place of business is 4 Irving Place, New York, N. Y. 10003, providing electric service in the City of New York and in Westchester County, to some 9,000,000 consumers.

d. Niagara Mohawk Power Corporation is a public utility incorporated under the laws of the State of New York, whose principal place of business is 300 Erie Boulevard West, Syracuse, New York 13202, providing electric service in northern New York State to approximately 3,500,000 consumers.

e. Orange and Rockland Utilities, Inc. is a public utility incorporated under the laws of the State of New York, whose principal place of business is 10 North Broadway, Nyack, New York, 10960, providing electric service in south central New York State and adjacent counties in New Jersey and Pennsylvania to some 520,000 consumers.

f. Public Service Electric & Gas Company is a public utility organized under the laws of the State of New Jersey, whose principal place of business is 80 Park Place, Newark, New Jersey 07101, providing electric service in the central corridor of northern and southern New Jersey, to some 4,200,000 consumers.

g. Rochester Gas & Electric Corporation is a public utility organized under the laws of the State of New York, whose principal place of business is 89 East Avenue, Rochester, N. Y., 14604, providing electric service in upstate New York State to some 245,000 customers in a service area where some 750,000 people live.

5. Each and all of the plaintiffs are engaged in the business of generating and supplying electricity as regulated public utilities and in the course of such business, purchase, ship by rail in interstate commerce, and consume, large quantities of bituminous steam coal. As more fully set forth below, the prices to be paid by the plaintiffs and each of them for shipping said coal will be materially affected and increased by the Order, since that Order will require them to pay approximately two million seven hundred thousand ($2,700,000) dollars additional annually for the shipment of such coal.

6. The Order permits the Class I railroads of the United States to put into effect freight rate increases proposed by such railroads, which increases range from 3%

to 10% on virtually all commodities shipped within the United States and specificially authorizes an increase of 5% in freight rates on bituminous steam coal, subject to 15 cents per ton maximum increase. The Order was the final administrative decision in the Ex Parte 259 proceeding which was commenced by the Class I railroads of the United States on March 7, 1968, when those railroads filed a petition with the ICC requesting an order enabling them to put into effect the above increases. The ICC granted the railroads' petition on the following day, March 8, 1968, despite the objections raised by shippers and by the United States Departments of Agriculture and Transportation. The ICC's March 8th order permitted the railroads to publish Master Tariff X-259 containing the proposed increases to become effective May 24, 1968. The ICC also decided to inquire into the proposed increased rates in the intervening period. Such inquiry consisted of the submission of written verified statements by the railroads and the protesting shippers. No cross-examination of any party was had, but oral argument in which plaintiffs' attorneys participated took place on June 13 and 14, 1968. On June 19, 1968, the ICC suspended Master Tariff X-259 to and including January 23, 1969, at the same time permitting the railroads to increase freight rates on all commodities by 3% and ordering hearings on the proposed increases. Such hearings were concluded on October 8, 1968, and without oral argument respecting said hearings, the interim order and the Order were entered, as above stated, on November 26, 1968 and on January 23, 1969 respectively.

7. All administrative remedies have been exhausted (5 U.S.C. §704).

8. The plaintiffs have standing to bring this action as persons aggrieved under 5 U.S.C. §702.

9. The Order is unlawful and in violation of the Interstate Commerce Act (49 U.S.C. §§1 et seq.) and the Administrative Procedure Act (5 U.S.C. §§551, et seq.), in that it permits the railroads to put into effect their proposed selective rate increases without evidence in the record as to the justness and reasonableness of such rates, without the ICC having reviewed the railroads' petition upon a proper record, without the ICC having performed the affirmative duty which the Interstate Commerce Act imposes upon the ICC, which duty is to itself examine into the justness, reasonableness and other aspects of such proposed increases, and without the ICC having afforded to plaintiffs their rights to procedural due process as guaranteed by the Constitution of the United States.

10. Despite motion having been duly made during the proceeding before the ICC by one of the parties thereto, the United States Department of Agriculture, for joinder of the ICC's Bureau of Accounts as a party (which motion was denied), no Bureau, Section member or employee of the ICC was a party to the proceeding before it, nor was there any representation of the public interest advanced by the ICC through its counsel or otherwise at any time throughout the proceeding.

11. The ICC failed to order its presiding examiners to make preliminary decisions on the matter before them and afford plaintiffs the opportunity to propose findings, conclusions or take exceptions thereto, without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions, in direct contravention of the requirements of 5 U.S.C. §557.

12. Although the Interstate Commerce Act requires that all rates shall be just, reasonable and non-discriminatory, (49 U.S.C.1(5) and 3(1)), the ICC permitted the railroads to put into effect increases in varying amounts upon different commodities, with no evidence as to the present cost to the railroads for providing the transportation services involved with respect to any commodity. Such evidence was requested by plaintiffs herein at various times throughout the proceedings, but repeatedly refused by the railroads and such refusal was upheld by the ICC's presiding examiners, and by the ICC.

13. Notwithstanding the fact that §15a(2) (49 U.S.C. §15a(2)) requires the ICC to give due consideration to the adverse effect of increased railroad rates upon the movement of traffic, the ICC allowed these increased freight rates to be put into effect with no evidence in the record to rebut the voluminous, specific and detailed evidence presented by shippers, including plaintiffs, that substantial loss of traffic would result from the proposed increases. The ICC based its findings in this regard on (a) the completely unsupported opinions and observations that with respect to the coal traffic with which these plaintiff-shippers are concerned, "costs of other forms of transportation, and of competing fuels are also increasing" (332 I.C.C. 734) for which statement there is no supporting evidence; and (b) the explicit assumption that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (332 I.C.C. 734). There exists not a scintilla of evidence in the record to support an assumption that "adjustments can be made by producers" of coal that will obviate losses and diversions of traffic from the railroads. By thus effectively delegating to the carriers sole discretion to determine which adjustments would be appro-

priate to meet competitive situations, the ICC abdicated to the railroads its function and duty statutorily imposed under §15a(2).

14. The Order is also unlawful because it permits the railroads to file varying rate increases on different commodities with no evidence presented by the railroads to justify an increase of 5% on coal as compared, for example, to 3% on certain other commodities. Furthermore, this increase was permitted in the face of substantial and uncontroverted evidence that coal traffic, prior to such increase, produced a disproportionate return to the carriers over and above the costs to them of providing that service. The order, in determining that cost of service for a commodity group or movement is an irrelevant factor in a rate proceeding, has merely established the test of "what the market can bear" as the governing principle herein and, as set forth above, has then proceeded to abdicate to the carriers the ICC's statutory function of determining just, reasonable and non-discriminatory rates.

WHEREFORE, it is respectfully requested that this Court permanently enjoin, suspend, annul and set aside the Order of the ICC of January 23, 1969 and grant such other and further relief as it deems appropriate in the circumstances.

Respectfully submitted,

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Motion of Aberdeen and Rockfish Railroad Company, et al. For Leave To Intervene As Defendants

In The

United States District Court

For the Southern District of New York

69 Civil Action 800

[Title Omitted in Printing]

Come now Aberdeen and Rockfish Railroad Company and the railroads and carriers named in Appendix A hereto, which railroads and carriers are hereinafter referred to as railroads, and hereby move this court for an order permitting their intervention as defendants in this case. In support of this motion it is respectfully shown:

I

By the complaint herein plaintiffs seek to enjoin and set aside an order of the Interstate Commerce Commission entered January 23, 1969 in a proceeding before that Commission entitled *"Ex Parte No. 259, Increased Freight Rates, 1968."*

II

These railroad movants were parties to the proceeding before the Commission in *Ex Parte No. 259, Increased Freight Rates, 1968,* that proceeding having been concerned with increased freight rates proposed by these railroads to offset increased costs.

III

That pursuant to 28 U.S.C. §2323 and Rule 24(a) of the Rules of Civil Procedure for the United States District

Courts these railroad movants as parties of interest in the proceeding before the Interstate Commerce Commission are accorded a statutory right to intervene.

IV

That a similar suit to set aside the orders of the Interstate Commerce Commission in *Ex Parte No. 259, Increased Freight Rates, 1968,* was filed on November 27, 1968 in the United States District Court, District of Columbia, in a case entitled *Alabama Power Company v. United States,* CA 2970-68, and that in that case the court has permitted these railroad movants to intervene as defendants.

Wherefore, these railroad movants pray that an order be entered permitting them intervention as defendants and permitting the filing of their answer attached hereto.

Respectfully submitted,

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Appendix A to Railroads' Motion to Intervene

LIST OF RAILROADS AND CARRIERS WHICH MOVE FOR LEAVE TO INTERVENE AS DEFENDANTS.

Aberdeen and Rockfish Railroad Company
Abilene & Southern Railway Company
Alnapee and Western Railway Company (The)
Akron & Barberton Belt Railroad Company (The)
Akron, Canton & Youngstown Railroad Company (The)
Alabama Great Southern Railroad Company (The)
Alabama, Tennessee and Northern Railroad Company
Albany and Northern Railroad Company
Algers, Winslow and Western Railway Company
Aliquippa and Southern Railroad Company
Alton and Southern Railroad
Angelina & Neches River Railroad Company
Ann Arbor Railroad Company (The)
Apache Railway Company (The)
Apalachicola Northern Railroad Company
Arcade and Attica Railroad Corporation
Arcata and Mad River Rail Road Company (The)
Arkansas & Louisiana Missouri Railway Company
Arkansas Western Railway Company (The)
Aroostook Valley Railroad Company
Ashley, Drew & Northern Railway Company
Atchison, Topeka & Santa Fe Railway Company (The)
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic and East Carolina Railway Company
Atlantic and Western Railway Company

Baltimore and Annapolis Railroad Company (The)
Baltimore and Eastern Railroad Company
Baltimore and Ohio Chicago Terminal Railroad Company (The)

Appendix A to Railroads' Motion to Intervene

Baltimore and Ohio Railroad Company (The)
Bangor and Aroostook Railroad Company
Bath and Hammondsport Railroad Company
Bauxite & Northern Railway Company
Beaver, Meade and Englewood Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Belton Railroad Company
Belt Railway Company of Chicago (The)
Bessemer and Lake Erie Railroad Company
Bevier & Southern Railroad Company
Birmingham Southern Railroad Company
Bonhomie and Hattiesburg Southern Railroad Company
Boston and Maine Corporation
Boston & Maine Transportation Company
Boyne City Railroad Company
British Columbia Hydro & Power Authority
Brooklyn Eastern District Terminal
Buffalo Creek Railroad Company (The) (Erie Lackawanna Railway Company and Lehigh Valley Railroad Company, Lessees)
Bush Terminal Railroad Company
Butte, Anaconda & Pacific Railway Company

Cadillac & Lake City Railway Company
Cadiz Railroad Company
California Western Railroad
Camas Prairie Railroad Company
Cambria and Indiana Railroad Company
Camp Lejeune Railroad Company
Canadian National Railways
Canadian Pacific Railway Company

Appendix A to Railroads' Motion to Intervene

Canadian Pacific Railway Lines in Maine
Canadian Pacific Railway Lines in Vermont
Canton Railroad Company
Carolina and Northwestern Railway Company
Carolina, Clinchfield and Ohio Railway: Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company
Cedar Rapids and Iowa City Railway Company
Central California Traction Company
Central Indiana Railway Company
Central of Georgia Railway Company
Central Railroad Company of New Jersey (The) (John E. Farrell, Trustee)
Central Vermont Railway, Inc.
Chattahoochee Industrial Railroad
Chattahoochee Valley Railway Company
Chattanooga Traction Company
Chesapeake and Ohio Railway Company (The)
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago & Illinois Western Railroad
Chicago and North Western Railway Company
Chicago and Western Indiana Railroad Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago Heights Terminal Transfer Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago River and Indiana Railroad Company (The)
Chicago, Rock Island and Pacific Railroad Company

Chicago Short Line Railway Company
Chicago South Shore and South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Cincinnati, New Orleans and Texas Pacific Railway Company (The)
City of Prineville Railway
Claremont & Concord Railway Company, Inc.
Clarendon and Pittsford Railway Company (The)
Cliffside Railroad Company
Colorado and Southern Railway Company (The)
Colorado & Wyoming Railway Company (The)
Columbia & Cowlitz Railway Company
Columbia, Newberry and Laurens Railroad Company
Columbus and Greenville Railway Company
Conemaugh & Black Lick Railroad Company
Corinth and Counce Railroad Company (The)
Coudersport and Port Allegany Railroad Company
Curtis Bay Railroad Company
Cuyahoga Valley Railway Company (The)

Dansville and Mount Morris Railroad Company (The)
Delaware and Hudson Railroad Corporation (The)
Delray Connecting Railway Company
Delta Valley and Southern Railway Company
Denver and Rio Grande Western Railroad Company (The)
DeQueen and Eastern Railroad Company
Des Moines and Central Iowa Railway Company
Detroit and Mackinac Railway Company
Detroit and Toledo Shore Line Railroad Company (The)
Detroit Terminal Railroad Company
Detroit, Toledo and Ironton Railroad Company
Doniphan, Kensett & Searcy Railway
Duluth & Northeastern Railroad Company
Duluth, Missabe and Iron Range Railway Company

Appendix A to Railroads' Motion to Intervene

Duluth, Winnipeg and Pacific Railway Company

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
East Tennessee and Western North Carolina Railroad Company
East Washington Railway Company
Elgin, Joliet and Eastern Railway Company
Erie-Lackawanna Railway Company
Escanaba and Lake Superior Railroad Company
Everett Railroad Company

Fairport, Painesville and Eastern Railroad Company (The)
Fernwood, Columbia and Gulf Railroad Company
Florida East Coast Railway Company
Fonda, Johnstown and Gloversville Railroad Company
Fore River Railroad Corporation
Fort Dodge, Des Moines & Southern Railway Company
Fort Myers Southern Railroad Company
Fort Smith and Van Buren Railway Company
Fort Worth and Denver Railway Company
Frankfort & Cincinnati Railroad Company

Gainesville Midland Railroad Company
Genesee and Wyoming Railroad Company
Georgetown Railroad Company
Georgia & Florida Railway Company
Georgia, Ashburn, Sylvester & Camilla Railway Company
Georgia Northern Railway Company (The)
Georgia Rail Road & Banking Company, Operated as the Georgia Railroad by Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company

Appendix A to Railroads' Motion to Intervene

Georgia Southern and Florida Railway Company
Grafton and Upton Railroad Company
Grand Trunk Railway System (Line in the United States East of the West Bank of The Detroit and St. Clair Rivers), comprising the following carrier: Canadian National Railway Company
Grand Trunk Western Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Green Mountain Railway Corporation
Greenville and Northern Railway Company
Greenwich & Johnsonville Railway Company
Gulf, Mobile and Ohio Railroad Company
Gulf Transport Company

Hampton & Branchville Railroad Company
Harriman and Northeastern Railroad Company
High Point, Thomasville & Denton Railroad Company
Hoboken Shore Railroad
Hollis & Eastern Railroad Company
Holton Inter-Urban Railway Company
Hoosac Tunnel and Wilmington Railroad Company
Hutchinson and Northern Railway Company (The)

Illinois Central Railroad
Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Indianapolis Union Railway Company (The)
Interstate Railroad Company
Iowa Terminal Railroad Co.
Ironton Railroad Company (The) (Lehigh Valley Railroad Company and Reading Company, Lessees)

Appendix A to Railroads' Motion to Intervene

Johnstown and Stony Creek Rail Road Company

Kanawha Central Railway Company (The)
Kansas City Public Service Freight Operation
Kansas City Southern Railway Company (The)
Kansas, Oklahoma & Gulf Railway Company (The)
Kelley's Creek and Northwestern Railroad Company
Kentucky & Indiana Terminal Railroad Company
Kentucky and Tennessee Railway
Kewaunee, Green Bay and Western Railroad Company

Lackawanna and Wyoming Valley Railroad Company
Lake Erie and Eastern Railroad
Lake Erie and Ft. Wayne Railroad
Lake Erie, Franklin & Clarion Railroad Company
Lakefront Dock and Railroad Terminal Company (The)
Lake Superior & Ishpeming Railroad Co.
Lake Terminal Railroad Company (The)
Laona & Northern Railway Company
LaSalle and Bureau County Railroad Company (The)
Laurinburg and Southern Railroad Company, Inc.
Lehigh and Hudson River Railroad Company (The)
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Live Oak, Perry & Gulf Railroad Company
Livonia, Avon & Lakeville Railroad Corporation
Long Island Rail Road Company (The)
Longview, Portland & Northern Railway Company
Lorain & West Virginia Railway Company
Louisiana & Arkansas Railway Company
Louisiana and North West Railroad Company (The)
Louisiana and Pine Bluff Railway Company (The)
Louisiana Southern Railway Company
Louisville and Nashville Railroad Company

Louisville and Wadley Railway Company
Lowville and Beaver River Railroad Company (The)
Ludington & Northern Railway

Maine Central Railroad Company
Manistique and Lake Superior Railroad Company
Manufacturers' Junction Railway Company
Manufacturers Railway Company
Marinette, Tomahawk & Western Railroad Company
Maryland and Pennsylvania Railroad Company
Massena Terminal Railroad Company (The)
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Meridian & Bigbee Railroad Company
Middle Fork Railroad Company
Middletown and New Jersey Railway Company, Inc.
Midland Continental Railroad
Midway Railroad Company
Minneapolis, Anoka and Cuyana Range Railroad Company
Minneapolis Industrial Railway Company
Minneapolis, Northfield and Southern Railway
Minnesota, Dakota & Western Railway Co.
Mississippi & Skuna Valley Railroad Company
Mississippi Export Railroad Company
Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Modesto and Empire Traction Company
Monongahela Connecting Railroad Company (The)
Monongahela Railway Company (The)
Monon Railroad
Montana Western Railway (The)
Montour Railroad Company

Appendix A to Railroads' Motion to Intervene

Montpelier & Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moscow, Camden & San Augustine Railroad
Moshassuck Valley Railroad Company
Mount Hope Mineral Railroad Company
Muncie and Western Railroad Company

Narragansett Pier Railroad Company, Inc. (The)
Napierville Junction Railway Company
Nevada Northern Railway Co.
Newburgh and South Shore Railway Company (The)
New Hope & Ivyland Railroad Company
New Jersey, Indiana & Illinois Railroad Company
New Orleans Lower Coast Railroad Company
New Orleans Terminal Company
New River Railway Company
New York and Long Branch Railroad Company (The)
New York Connecting Rail Road Company (The)
New York Dock Railway
New York, Susquehanna and Western Railroad Company
Niagara Junction Railway Company
Norfolk & Portsmouth Belt Line Railroad
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Norfolk Southern Railway Company
Northampton and Bath Railway Company
Northern Pacific Railway Company
Norwood & St. Lawrence Railroad Company

Ogdensburg & Norwood Railway Co.
Omaha, Lincoln and Beatrice Railway Company
Oregon & Northwestern Railroad Company

Appendix A to Railroads' Motion to Intervene

Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Trunk Railway
Owasco River Railway (The)

Pacific Coast R.R. Co.
Pacific Great Eastern Railway Company
Patapsco & Back Rivers Railroad Company
Pecos Valley Southern Railway Company (The)
Pennsylvania and Atlantic Railroad Company (Note)
(Note: South of Highstown, N. J. to Pemberton, N. J., incl.) (The Union Transportation Company, Lessee)
Penn Central Company
Pennsylvania-Reading Seashore Lines
Peoria & Eastern Railway
Peoria and Pekin Union Railway Company
Petaluma and Santa Rosa Railroad Company
Philadelphia, Bethlehem and New England Railroad Company
Piedmont and Northern Railway Company
Pioneer and Fayette Railroad Company (The)
Pittsburg & Shawmut Railroad Company (The)
Pittsburgh, Allegheny & McKees Rocks Railroad Company
Pittsburgh and Lake Erie Railroad Company (The)
Pittsburgh and Ohio Valley Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Company
Point Comfort & Northern Railway Company
Port Huron and Detroit Railroad Company
Portland Terminal Company
Portland Traction Company (Portland Railroad and Terminal Division)
Port of Tillamook Bay Railroad
Port Townsend Railroad

Appendix A to Railroads' Motion to Intervene

Prescott and Northwestern Railroad Company (The)
Quanah, Acme & Pacific Railway Company
Quebec Central Railway Company

Railway Valley Company (Railway Valley Company, Lessee)
Raritan River Rail-Road Company
Reader Railroad
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
River Terminal Railway (The)
Rockdale, Sandow & Southern Railroad Company
Roscoe, Snyder and Pacific Railway Company
Rosslyn Connecting Railroad Company

Sabine River & Northern Railroad Company
Sacramento Northern Railway
St. Johnsbury & Lamoille County Railroad
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Salt Lake, Garfield and Western Railway Company
Sandersonville Railroad Company
San Diego & Arizona Eastern Railway Company
Sand Springs Railway Company
San Luis Central Railroad Company (The)
Santa Maria Valley Railroad Company
Savannah & Atlanta Railway Company
Savannah State Docks Railroad Company
Seaboard Coast Line Railroad Company
Sierra Railroad Company
Skaneateles Short Line Railroad Corporation
Soo Line Railroad Company

South Brooklyn Railway Company
South Buffalo Railway Company
Southern Indiana Railway, Inc.
Southern New York Railway, Incorporated
Southern Pacific Company
Southern Railway Company
Southern San Luis Valley Railroad Company
South Georgia Railway Company (The)
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
Springfield Terminal Railway Company (Vermont)
Staten Island Rapid Transit Railway Company (The)
State University Railroad Company
Steelton & Highspire Railroad Company
Stewartstown Railroad Company (The)
Stockton Terminal and Eastern Railroad
Strasburg Rail Road Company
Strouds Creek and Muddlety Railroad
Sumter & Choctaw Railway Company
Sunset Railway

Tampa Southern Railroad Company
Tavares and Gulf Railway Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railroad Company
(Samuel Spencer and Sam A. Blair, Receivers)
Terminal Railroad Association of St. Louis
Texas & Northern Railway Company
Texas and Pacific Railway Company (The)
Texas Central Railroad Co.
Texas, Oklahoma & Eastern Railroad Company
Texas Mexican Railway Company (The)
Texas-New Mexico Railway Company
Texas South-Eastern Railroad Company

Tidewater Southern Railway Company
Toledo, Angola & Western Railway Company (The)
Toledo, Peoria & Western Railroad Company
Toledo Terminal Railroad Company (The)
Tooele Valley Railway Company
Toronto, Hamilton and Buffalo Railway Company (The)
Trenton-Princeton Traction Company
Trona Railway Company
Tulsa-Sapulpa Union Railway Company
Twin Branch Railroad Company

Union Freight Railroad Company
Union Pacific Railroad Company
Union Railroad Company
Unity Railways Company
Upper Merion and Plymouth Railroad Company

Valdosta Southern Railroad Company
Valley & Siletz Railroad Company
Ventura County Railway Company
Vermont Railway, Inc.
Virginia Blue Ridge Railway
Virginia Central Railway
Visalia Electric Railroad Company

Walla Walla Valley Railway Company
Warren & Saline River Railroad Company
Warrenton Rail Road Company
Warwick Railway Company
Washington, Idaho & Montana Railway
Washington Terminal Company (The)
Waynesburg and Washington Railroad Company
Weatherford, Mineral Wells and Northwestern Railway Company (The)

Appendix A to Railroads' Motion to Intervene.

Wellsville, Addison & Galeton Railroad Corporation
Western Maryland Railway Company
Western Pacific Railroad Company (The)
Western Railway of Alabama (The)
West Pittston-Exeter Railroad Company
West Virginia Northern Railroad Company
Wharton and Northern Railroad Company
Wilkes-Barre Connecting Railroad
Winchester and Western Railroad Company
Winfield Railroad Company (The)
Winifrede Railroad Company
Winston-Salem Southbound Railway Company
Wrightsville and Tennille Railroad Company
Wyandotte Southern Railroad Company
Wyandotte Terminal Railroad Company

Yakima Valley Transportation Company
Yancey Railroad Company
Youngstown and Northern Railroad Company (The)
Youngstown & Southern Railway Company
Yreka Western Railroad Company

Railroads' Memorandum in Support of Motion to Intervene

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

STATEMENT

This is an action to enjoin, annul or set aside the Order of the Interstate Commerce Commission dated January 23, 1969 with respect to Master Tariff X 259 containing rate increases.

ARGUMENT

Title 28 §2323, United States Code provides in relevant part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

As appears from the Motion and Affidavit herein, the proposed intervenors were parties in interest to the proceeding for the Interstate Commerce Commission which resulted in the Orders involved in this case.

Rule 24 of the Federal Rules of Civil Procedure provides in relevant part as follows:

> "(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene;***"

Accordingly the proposed intervenors have an absolute right to intervene as parties in this action and respectfully request the granting of their motions for such intervention.

Respectfully submitted,

JEROME H. SHAPIRO
Attorney for Intervenors

Proposed Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Aberdeen and Rockfish Railroad Company, et al, intervenors as defendants, in answer to the above complaint:

I

Admit the allegations of Paragraph 1.

II

Admit the allegation of Paragraph 2 that jurisdiction of the District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by Sections 1336, 1398, 2284 and 2231-2325 of Title 28 of the United States Code and Section 703 of Title 5 of the United States Code, but deny the allegation of Paragraph 2 that the court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and January 9, 1969, 332 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates, 1968.*

III

Admit the allegations of Paragraphs 3 and 4.

IV

Admit the allegations in the first sentence in Paragraph 5, but deny all other allegations of Paragraph 5.

V

Admit the allegation of Paragraph 6 that the Interstate Commerce Commission entered orders in the *Ex Parte No. 259, Increased Freight Rates, 1968* proceeding on March 8, 1968; June 19, 1968; November 25, 1968 and January 9, 1969, but deny that those were the only orders entered in *Ex Parte No. 259* and deny all other allegations of Paragraph 6 and refer the court to the Commission's orders for a complete and accurate statement of their contents and to the record before the Commission for a complete and accurate description of the procedures in that case.

VI

Deny the allegation of Paragraph 7 that all administrative remedies of plaintiffs have been exhausted, the plaintiffs having failed to exercise their rights under the remedies described by the Commission in its January 9 report and order, which remedies are set forth in Sections 13 and 15 of Title 49 of the United States Code.

VII

Deny the allegations of Paragraphs 8 and 9.

VIII

Admit that the Interstate Commerce Commission was not a party to the proceeding before it in *Ex Parte No. 259*, but deny that there was any legal requirement for the Commission to become a party thereto, and deny each and every other allegation of Paragraph 10.

IX

Admit that no Recommended Report of the presiding hearing examiners was served on the parties, but deny that there is any legal requirement that such a recommended report be issued and deny that the Interstate Commerce Commission failed to state on the record that a recommended report would be omitted because due and timely execution of the Commission's function required an expedited decision, and deny each and every other allegation of Paragraph 11.

X

Admit that the Interstate Commerce Commission permitted the railroads to put into effect increases in varying amounts upon different commodities, but deny each and every other allegation of Paragraph 12.

XI

Deny the allegations of Paragraphs 13 and 14.

XII

Except as expressly admitted herein, deny each and every allegation in the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE railroad intervenors as defendants pray that the complaint be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

JEROME H. SHAPIRO
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Motion for Leave to Intervene by State of New York, and Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I.

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts (hereinafter the "Departments of Agriculture of the Northeastern States"), under Rule 24 of the Rules of Civil Procedure, hereby move the Court for an order permitting them to intervene as plaintiffs in this action, so that they may make and establish the claims set forth in the proposed complaint pleading attached hereto.

II.

The State of New York and the Departments of Agriculture of the Northeastern States were parties in interest in the proceedings before the Interstate Commerce Commission, Ex Parte 259, *Increased Freight Rates, 1968*, out of which this court action arose, and under the Judicial Code, 28 U.S.C. Section 2323, they may intervene herein as a matter of right, by orderly and appropriate procedure, and be represented by counsel in this proceeding. The

pertinent portion of the Judicial Code is quoted below for convenience:

> "The Attorney General shall represent the Government in the actions specified in Section 2321 of this title and in actions under Sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. As amended, May 24, 1949, c. 139, Section 116, 63 Stat. 105.
>
> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid Sections may intervene in said action at any time after commencement thereof.
>
> "The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

III.

WHEREFORE, the State of New York, and the Departments of Agriculture of the Northeastern States named above pray that an order be entered permitting them to intervene in this action and to file the proposed complaint pleading attached hereto.

Respectfully submitted,

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For the Departments of Agriculture of the Northeastern States

Intervenors' Proposed Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland, and Massachusetts for their complaint herein allege:

1. Plaintiffs bring this action to enjoin, annul and set aside the order of the Interstate Commerce Commission (hereinafter "the Commission") of January 23, 1969 (attached hereto as Appendix A) which order incorporates and makes a part thereof the interim order of the Commission issued November 26, 1968, and the order of the Commission denying reconsideration thereof dated March 26, 1969, and served April 1, 1969 (attached hereto as Appendix B), in a proceeding before the Commission entitled Ex Parte 259, *Increased Freight Rates, 1968*. Each of the plaintiffs was a party to the proceedings before the Commission which resulted in said orders and out of which the present action arises.

2. The jurisdiction of this Court is founded upon 5 U.S.C. Section 703 and 28 U.S.C. Sections 1336, 1398, 2284 and 2321-2325. The United States of America is named a statutory defendant pursuant to 28 U.S.C. Section 2322.

3. Plaintiffs herein are the following:

a. The Department of Agriculture of the State of Connecticut is a governmental department of that State

with principal offices at the State Office Building, Hartford, Connecticut 06115.

b. The Board of Agriculture of the State of Delaware is a governmental department of that State with principal offices at Drawer D, Dover, Delaware 19901.

c. The Department of Agriculture of the State of Maine is a governmental department of that State with principal offices at the State House, Augusta, Maine 04330.

d. The Maryland State Board of Agriculture is a governmental department of that State with offices at Symons Hall, University of Maryland, College Park, Maryland 20742.

e. The Department of Agriculture of the Commonwealth of Massachusetts is a governmental department of that Commonwealth with principal offices at 100 Cambridge Street, Boston, Massachusetts 02202.

f. The Department of Agriculture of the State of New Hampshire is a governmental department of that State with principal offices at the State House Annex, Concord, New Hampshire 03301.

g. The Department of Agriculture of the State of New Jersey is a governmental department of that State with principal offices at Box 1888, Trenton, New Jersey 08625.

h. The State of New York is represented through its Attorney General who has offices at the Capitol, Albany, N. Y. 12224 and 80 Centre Street, New York, N. Y. 10007.

i. The Department of Agriculture of the Commonwealth of Pennsylvania is a governmental department of that Commonwealth with principal offices at 2301 North Cameron Street, Harrisburg, Pennsylvania 17120.

j. The Director of Natural Resources of the State of Rhode Island is a governmental department of that State with offices at Veterans Memorial Building, 83 Park Street, Providence, Rhode Island 02904.

k. The Department of Agriculture of the State of Vermont is a governmental department of that State with principal offices at Montpelier, Vermont 05602.

l. The Department of Agriculture and Commerce of the Commonwealth of Virginia is a governmental department of that Commonwealth with principal offices at 203 North Governor Street, Richmond, Virginia 23219.

4. The plaintiffs are a State, or the departments of State governments, responsible for protecting and promoting the agriculture of their respective States. The agricultural economies of the Northeastern States are heavily dependent upon the inbound movement by rail of grain, feed and feed ingredients from other States. The increase in the rail freight rates on these commodities resulted in an additional burden on Northeastern agriculture of more than $2.4 million annually, according to the record before the Commission.

5. The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 383, and amendments thereto, with specifically vested duties and responsibilities to apply and enforce the statutory standards of the Interstate Commerce Act and the various acts amendatory thereof and supplemental thereto, including specifically the policy set forth in the Hoch-Smith Resolution, 49 U.S.C. Section 55, 43 Stat. 801.

6. The report and orders herein complained of, and which plaintiffs seek to have enjoined, annulled, and set

aside, permitted the railroads to put into effect proposed rail freight rate increases ranging from 3% to 10%, the increases authorized varying by region and/or commodity, with an increase of 6% specifically authorized on grain, feed, and feed ingredients moving into the Northeastern States.

7. The proceedings before the Commission leading to the orders complained of consist of an investigation conducted under special rules of procedure set forth in a Commission order entered July 3, 1968. Separate hearings were held on the issues of the railroads' cost and revenue need (Sub-No. 2) and the lawfulness of rate increases on ten groups of individual commodities (Sub-Nos. 3-11). The railroads' cost and revenue needs, on the one hand, and the increases in rate on individual commodities, on the other hand, were treated as separate and distinct issues, under the hearing procedures followed by the Commission. In its report and order served January 23, 1969, the Commission found that the railroads had established a need for increased revenues but refused to rule on the lawfulness of the contribution to such revenues required of any given commodity or region by explicitly rejecting evidence of the present costs borne by such traffic. The Commission further refused to require justification for differing increases as to different commodities or regions. The Commission ruled that such authorization did not "preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792. In an order served April 1, 1969, the Commission denied the Petitions for Reconsideration of New York and the Northeastern States on the sole grounds that "sufficient grounds have not been presented to warrant granting the action sought."

8. The order of the Commission dated March 26, and served April 1, 1969, denying reconsideration sought by plaintiffs was a final administrative decision in that proceeding, plaintiffs thereby having exhausted their administrative remedies with respect to the Commission's action in authorizing said rate increase.

9. Plaintiffs have standing to bring this action as parties aggrieved under 5 U.S.C. Section 702 in that the Commission's authorization of rate increases in and of itself inflicts legal wrong upon the interests represented by plaintiffs.

10. The Commission, in the orders under review, erred in the following respects:

(a) The Commission erred as a matter of law in permitting increases of varying amounts on different commodities and in different regions while rejecting, and ruling irrelevant, evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues; such error was, in addition, arbitrary, capricious, an abuse of discretion, and deprived plaintiffs of due process and a fair hearing;

(b) The Commission acted arbitrarily, capriciously and abused its discretion in refusing to give any consideration whatsoever to plantiffs' cost study on the grounds that consideration of such studies would make impossible the effective prosecution of its regulatory function, where plaintiffs presented a comprehensive cost study for the traffic involved, such study was received into evidence, the railroads declined to cross-examine thereon, and in fact submitted evidence verifying the accuracy of such study;

(c) The Commission, acted arbitrarily and capriciously in finding that specific increases on grain to the Southeast,

an area in intense competition with the Northeast, approximated 5 to 6.3% and were thus comparable to the 6% increase in the rates to the Northeast; such finding was contradicted by the evidence of record and the Commission's own findings (332 I.C.C. 749, footnote 3); the Commission's refusal to correct such fundamental error on reconsideration was arbitrary, capricious, and an abuse of discretion;

(d) The Commission's refusal to conclude that the respective increases authorized were unduly prejudicial of the Northeast and unduly preferential of the Southeast was based on a fundamental misconception of the percentage increases authorized to the Southeast; the Commission's refusal to so conclude was, therefore, arbitrary, capricious, an abuse of discretion, and a denial of plaintiffs' right to due process and a fair hearing;

(e) The Commission erred as a matter of law, and acted arbitrarily and capriciously, in finding that prior reductions in rates, based on heavier loading and reduced service, justified the rate increase at issue;

(f) The Commission erred as a matter of law in totally refusing to consider, or apply, the policy, and statutory standards reflected therein, set forth in the Hoch-Smith Resolution, 49 U.S.C. Section 55;

(g) The Commission acted contrary to statutory requirements, arbitrarily and capriciously, and abused its discretion in refusing to consider or to give any weight to, economic conditions and trends in Northeastern agriculture and, in particular, the impact of declining prices, in determining the effect of the protested rate increase on the movement of traffic, on the free movement of commodities,

on the natural and proper development of the country as a whole, and on the ability of Northeastern agriculture to bear such rate increase, thereby violating Section 15a(2) of the Interstate Commerce Act;

(h) Specifically, the Commission acted arbitrarily, capriciously, abused its discretion, and denied plaintiffs due process and a fair hearing by refusing to consider the inability of Northeastern agriculture to pass on freight rate increases to the consumer, in determining the effect of the freight rate increase on the movement of traffic;

(i) The Commission denied plaintiffs due process and a fair hearing by refusing to make requested findings and conclusions regarding economic conditions in Northeastern agriculture, and to base its decision thereon, while according such consideration to other industries;

(j) The Commission's conclusion that the increased freight rates authorized will have no undue adverse effect on the movement of the traffic involved is not supported by necessary subsidiary findings or by substantial evidence, and is in fact contrary to the evidence of record;

(k) The Commission erred as a matter of law in authorizing selective, varying percentage rate increases on various commodities and in various regions without applying mandatory statutory standards of reasonableness and preference and prejudice to such individual increases.

WHEREFORE plaintiffs pray

(1) That a three-judge court be convened pursuant to the provisions of Section 2284(1) of Title 28 of the United States Code.

(2) That after hearing before such court judgment be entered permanently enjoining, annulling and setting aside the complained of Commission order.

(3) That plaintiffs be granted such other and further relief as the Court deems appropriate in the circumstances.

Respectfully submitted,

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State of New York's Proposed Complaint

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Answer of the Interstate Commerce Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

FIRST DEFENSE

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the Interstate Commerce Commission, a defendant herein, avers that the complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable for the following reasons:

1. The said orders of the Commission are permissive in nature and do not approve the justness or reasonableness of any particular rate.

2. The plaintiffs have failed to exhaust their administrative remedies under 49 U.S.C. 13 and 15 by attacking the justness and reasonableness of the rates applicable to the commmodities shipped or received by them.

3. The plaintiffs lack standing to maintain this action since they have suffered no independent legal wrong by reason of the orders of the Commission here under attack.

SECOND DEFENSE

Without waiving their First Defense, defendant answers the allegations of the complaint on the merits as follows:

I.

Admits the allegations of Paragraph 1.

II.

With respect to the allegations of Paragraph 2, admits that the United States is a statutory defendant under 28 U.S.C. 2322 and that section 703 of Title 5 and sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code allow judicial review of certain orders of the Commission but denies that these sections apply to the permissive orders here challenged.

III.

Admits the allegations of Paragraph 3.

IV.

With respect to the allegations of Paragraph 4, admits that plaintiffs are public utilities incorporated and residing in various states as alleged but denies the remaining allegations because it lacks knowledge or information sufficient to form a belief as to the truth thereof.

V.

With respect to the allegations of Paragraph 5, admits that plaintiffs engage in the business of generating and supplying electricity as regulated public utilities but denies the remaining allegations.

VI.

With respect to the allegations of Paragraph 6, admits that the Commission entered, among others, the orders referred to but respectfully refers the Court to those orders and the record in the proceedings for a complete and accurate description of their contents, the Commission's actions and the procedures followed; otherwise, denies the remaining allegations of Paragraph 6.

VII.

Denies the allegations of Paragraphs 7, 8, 9, 10, 11, 12, 13 and 14, inclusive.

VIII.

In further answer to the allegations of the complaint, denies that the actions of the Commission here challenged are unlawful or improper for the reasons alleged or for any other reason and avers that the Commission acted lawfully in all respects.

WHEREFORE, defendant prays that the complaint be dismissed and all relief sought be denied.

ROBERT W. GINNANE
General Counsel

ARTHUR J. CERRA
Associate General Counsel
PHILIP W. GETTS
Attorney
Interstate Commerce Commission
Washington, D. C. 20423
Attorneys for the Interstate
Commerce Commission

Answer of the United States of America

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The United States of America, a defendant in the above action, in answer to the complaint and intervening complaint neither admits nor denies the allegations thereof. The United States of America neither supports nor opposes the order of the Commission.

RICHARD W. MCLAREN
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United States Attorney
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JOHN H. D. WIGGER
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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland, and Massachusetts, having moved for leave to intervene as party plaintiffs in this action and their right thereto appearing and there being no opposition thereto, it is

ORDERED that said motion to intervene herein be and the same hereby is granted and the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts shall appear herein as party plaintiffs and may assert the allegations in the complaint annexed to said intervenors' motion for leave to intervene.

Dated: New York, New York
May 8, 1969

CHARLES M. METZNER
U. S. D. J.

Order

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

This matter having come on upon the motion of the Aberdeen and Rockfish Railroad Company, et al., to intervene as defendants in this proceeding and the Court having considered the motion and being fully advised in the premises, it is hereby:

Ordered that the Aberdeen and Rockfish Railroad Company and the railroads and carriers listed in Appendix A of the motion, be permitted to intervene as defendants and be permitted to file their answer.

Charles M. Metzner
United States District Court Judge

Dated: May 8, 1969

Motion for Appointment of Statutory Three-Judge Court and for Prehearing Conference

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, upon their complaint previously filed, hereby make application for hearing of this cause which seeks a permanent injunction restraining the enforcement, operation or execution of an order of the Interstate Commerce Commission, which order was issued by that Commission on January 23, 1969, before a three-judge District Court, as required by 28 U.S.C. §2325 and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to 28 U.S.C. §2284, of presentation of plaintiffs' application for injunction in order that necessary designation of judges for said court may be made.

Defendant Interstate Commerce Commission in its answer to Plaintiffs' complaint pleads as a defense failure of Plaintiffs to state a claim upon which relief can be granted. Plaintiffs therefore petition for the setting of a date for a prehearing conference before one or more judges of the three-judge panel, in order to promptly arrange for the best procedure to be followed herein to determine whether Plaintiffs have a claim upon which relief can be granted.

WHEREFORE, Plaintiffs hereby move this Court for an order appointing a statutory three-judge court, and for the setting of a date for a prehearing conference.

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Statement of Position of the Interstate Commerce Commission on Pending Motion of Plaintiffs, et al.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The motion of plaintiffs and intervening plaintiffs requests the convening of a statutory three-judge court pursuant to 28 U.S.C. 2284 and the setting of a date for a prehearing conference before one or more judges of the three-judge court, in order to promptly arrange for the best procedure to determine the Interstate Commerce Commission's affirmative defense as to whether plaintiffs have a claim upon which relief can be granted.

The Commission states its position as follows:

(1) Insofar as the Motion requests the appointment of a statutory three-judge court pursuant to 28 U.S.C. 2284, it should be granted.

(2) The Motion's remaining relief which requests the setting of a date for a prehearing conference before one or more members of the yet to be appointed three-judge court is premature and should be denied for the following reasons:

(a) The time for answering the intervening complaint by the Commission and the intervening defendant railroads has not expired and will not expire until July 1, 1969. That time is required to study the individually different situation presented. Additionally, that time is required to permit counsel for the Commission to prepare

a brief on the merits in an action in the United States District Court for the District of Columbia[1] attacking the same orders of the Commission in their entirety.[2]

(b) The three-judge court to be appointed is the appropriate panel to address any request for a prehearing conference to establish procedures for disposing of the case. Such action requires consideration of the individual docket commitments of each panel member. Moreover, piecemeal consideration of an affirmative defense without reference to the merits of the case could conceivably result in the requirement that the appointed three-judge panel convene twice to hear argument in the case. In view of the crowded docket of this District Court and the Second Circuit Court of Appeals, it would seem more appropriate for the appointed three-judge panel to decide as to the proper procedure for disposition of the instant judicial review action. In our view it is more conducive to orderly judicial procedure and convenient to the members of the panel and the litigants to brief and argue all issues in the case at one time and thus avoid any possible interlocutory appeals to Supreme Court and rehearings.

Accordingly, the Commission consents to the granting of the Motion insofar as it requests the appointment of a

1. *Alabama Power Company, et al.* v. *United States, et al.*, Civil Action No. 2970-68.

2. Contrast the allegations there with the limited basis of attack alleged in the complaint and intervening complaint herein.

statutory three-judge court and respectfully prays that the other relief be denied.

ROBERT W. GINNANE
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ARTHUR J. CERRA
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PHILIP W. GETTS
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Attorneys for the Interstate Commerce Commission

Designation of Judges

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Having been notified by the Honorable Edward C. McLean, United States District Judge for the Southern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2325 for a judicial review of certain actions, findings, conclusions and orders of the Interstate Commerce Commission, pursuant to Title 28 United States Code Section 2284, I hereby designate the following judges, in addition to the Honorable Edward C. McLean, to hear and determine said cause as provided by law: Honorable Irving R. Kaufman, United States Circuit Judge, and Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard
Chief Judge, United States Court
of Appeals for the Second Circuit

Dated: New York, N. Y.
June 4, 1969.

Answer of the Interstate Commerce Commission to the Intervening Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

FIRST DEFENSE

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the Interstate Commerce Commission, a defendant herein, avers that the intervening complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable for the following reasons:

1. The said orders of the Commission are permissive in nature and do not approve the justness or reasonableness of any particular rate.

2. The plaintiffs have failed to exhaust their administrative remedies under 49 U.S.C. §§13 and 15 by attacking the justness and reasonableness of the rates applicable to the commodities shipped or received by them.

3. The plaintiffs lack standing to maintain this action since they have suffered no independent legal wrong by reason of the orders of the Commission here under attack.

SECOND DEFENSE

Without waiving its First Defense, defendant answers the allegations of the intervening complaint as follows:

Answer of the Interstate Commerce Commission to the Intervening Complaint

I.

Admits the allegations of Paragraph 1, but respectfully refers the Court to all reports, orders, and other documents referred to therein for a complete and accurate description of their contents.

II.

With respect to the allegations of Paragraph 2, admits that the United States is a statutory defendant under 28 U.S.C. 2322 and that section 703 of Title 5 and sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code allow judicial review of certain orders of the Commission but denies that these sections apply to the permissive orders here challenged.

III.

Admits the allegations of Paragraph 3 and sub-paragraphs thereof.

IV.

With respect to the allegations of Paragraph 4, admits that plaintiffs are States or the departments of States, but otherwise, defendant is without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4.

V.

Admits the allegations of Paragraphs 5 and 6, but respectfully refers the Court to all statutes and orders referred to therein for a complete and accurate statement of their contents.

VI.

With respect to the allegations of Paragraph 7, admits that in the instant proceeding, Ex Parte No. 259, the Com-

mission conducted hearings, received and considered evidence, and issued orders, but respectfully refers the Court to the official record of that proceeding for a complete and accurate description of the Commission's actions therein; otherwise, denies the allegations of Paragraph 7.

VII.

Denies the allegations of Paragraphs 8 through 10 inclusive and sub-paragraphs thereof.

VIII.

In further answer to the intervening complaint, denies that the Commission has acted unlawfully in any manner, and avers that the orders here challenged are lawful and proper in all respects.

WHEREFORE, defendant prays that the intervening complaint be dismissed and all relief sought denied.

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Associate General Counsel

PHILIP W. GETTS
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Motion of Defendant Interstate Commerce Commission to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Now comes defendant, the Interstate Commerce Commission, and respectfully moves the Court to dismiss this action on the grounds that plaintiffs and intervening plaintiffs have failed to state a claim against defendant upon which relief can be granted.

Respectfully submitted,

ROBERT W. GINNANE
General Counsel

ARTHUR J. CERRA
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Washington, D. C. 20423

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Memorandum of the Interstate Commerce Commission In Support of Its Motion to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Statement of the Case

This is an action to set aside and annul an order of the Interstate Commerce Commission entered January 9, 1969, in Docket No. Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, the relevant particulars of which are discussed below.

In answer to the Complaint, the Commission asserted a First Defense, alleging that plaintiffs,[1] for various reasons, were not entitled to judicial review of the order assailed. Plaintiffs requested and were granted a pre-hearing conference to decide how best to dispose of this defense. At this conference, Judge McLean requested the Commission to file a motion to dismiss in order to facilitate a hearing limited to its First Defense.

In compliance with that request, the Commission has herewith filed a Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, asserting that plaintiffs have failed to state a claim upon which relief can be granted.

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1. Unless otherwise noted, the word "plaintiffs" include intervening plaintiffs.

Statutes Involved

The statutes involved are Sections 13 and 15 of the Interstate Commerce Act. Section 13(1) (49 U.S.C. §13(1)) provides:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(1) (49 U.S.C. §15(1)) provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this part,

or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Question Presented by Defendant's Motion to Dismiss

Whether individual shippers attacking only two rates may seek judicial review of a Commission order which approved the general level of rates but which did not pass on the reasonableness of the particular rates attacked by plaintiffs.

ARGUMENT

Individual shippers may not seek review of Commission orders approving an increase in the general level of rates by alleging only that a particular rate included therein is unjust and unreasonable.

Plaintiffs, as individual shippers concerned only with specific commodities, have asked this Court to set aside a Commission order dealing with the over-all railroad freight rate structure on the grounds that two rates— small parts of that order—are unjust and unreasonable. Yet plaintiffs admittedly seek this relief without having followed the statutorily prescribed means of seeking review of the justness and reasonableness of these rates and without alleging that they have suffered any invasion of their rights aside from a duty to pay increased rates on grain and coal. As will be seen, such allegations do not state a claim upon which relief can be granted.

The statutory scheme of rate-making does not contemplate review of the general orders here challenged. *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935); *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (M.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957). Rate-making is a complex task, and Congress has carefully allocated the burdens of this process among the

carrier, the agency, and the court. Initiation of rate changes is left solely to the carrier, and the Commission has the power only to approve or disapprove the carrier's proposals, although it may also prescribe maximum or minimum rates or rate levels if it finds the carriers' proposals to be unjust and unreasonable. Judicial review of a rate is proper only when (1) the Commission has issued a final order, after a hearing, finding a proposed rate to be just and reasonable, or (2) when a shipper has filed a complaint under sections 13 and 15 of the Interstate Commerce Commission Act (49 U.S.C. §§13 and 15) attacking the rate and the Commission has dismissed the complaint.[2] Absent these two conditions—neither of which are present here—Congress and the Courts have prohibited judicial review of Commission orders allowing rates to become effective. See, *e.g. Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977 (W.D.Wis. 1967); *Luckenbach S.S. Co.* v. *United States*, 179 F.Supp. 605 (D.Del. 1959), *dismissed as moot*, 364 U.S. 280 (1960). Plaintiffs admit that they have not filed complaints under sections 13 and 15 of the Act, but they nevertheless allege that they have exhausted their administrative remedies and that the order in question is reviewable. Plaintiffs' claims of reviewability ignore the true nature of the Commission's order and, in light of the undisputed facts, are not a legally sufficient predicate for judicial review.

In the instant case, the railroads determined that they required immediate increases in the general level of rates on virtually all commodities to meet rapidly rising operating costs. Rather than file a separate tariff proposing a new

2. Conversely, a carrier may seek review only when the Commission has specifically rejected a proposed rate in either of the two situations described.

rate on each commodity involved, the carriers sought and received on March 8, 1968, special permission to publish the increases in the general level of rates by means of a master tariff with connecting link supplements making the ordinary rate tariffs subject to the selective percentage increases specified in the master tariff.[3] The order here attacked merely approved use of this publication procedure as a means of expeditiously effecting the necessary increases,[4] which the Commission found "will not exceed a maximum reasonable level." The order specifically did not pass on the justness and reasonableness of individual rates but provided for correction of individual rate maladjustments through complaint and investigation as provided by 49 U.S.C. §§13 and 15 (See 332 I.C.C. at 608; 332 I.C.C. at 792.)

Courts have consistently held that there can be no judicial review of such an order. In *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1934), coal shippers attacked a similar general increase order alleging only that the rates for coal were unjust and unreasonable; the court denied review on the grounds that an order in a general revenue case is permissive only and does not finally approve specific rates. 11 F.Supp. at 492-94. Similary, in *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955), the court dismissed a complaint attack-

3. Similar procedures have frequently been employed when the railroads have sought general increases based on a showing of revenue need, see, *e.g.*, *Increased Freight Rates, 1951*, 284 I.C.C. 575, *Increased Freight Rates, 1960*, 311 I.C.C. 373, and the Supreme Court has approved the use of these general revenue procedures to grant general rate increases. See *Louisiana* v. *United States*, 290 U.S. 70, at 77 (1933); *New England Divisions Case*, 261 U.S. 184, 197-198 (1923).

4. Specifically, the orders vacated earlier suspension orders and permitted the carriers to depart from the long-and-short haul clause of Section 4 of the Interstate Commerce Act (49 U.S.C. §4) and from the tariff filing requirements of Section 6.

ing a specific rate included in a general increase order, observing that the Commission, by its order, "was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all railroads in the country." 132 F.Supp. at 163. See also, *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (M.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957), where the court denied review of a general increase order attacked on the ground that particular rates were unjust and unreasonable.

As these cases uniformly recognize, plaintiffs' proper remedy is the filing of a complaint with the Commission pursuant to sections 13 and 15 of the Interstate Commerce Act (49 U.S.C. §§13 and 15) attacking the particular rates in question as unjust and unreasonable. The impropriety of allowing judicial review of this order in the absence of exhaustion of these statutory remedies is demonstrated by plaintiffs' prayers for relief, which seek reversal of the order approving the entire general increase because just two specific rates may be unjust and unreasonable. If the Court were to grant this relief, the railroads would be denied all the revenues to which the Commission concluded they were entitled—a conclusion plaintiffs do not challenge. As was said in *Koppers Co.* v. *United States, supra:*

> It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15

> has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits. [132 F.Supp. at 163].

Moreover, neither group of plaintiffs has alleged facts showing that any of their rights or interests will be unlawfully invaded by the order in question. Plaintiff electric companies allege only that they will be subjected to higher rates on coal and do not and cannot allege that these rates are unlawful; nor do they allege that they will be in any worse position than other similarly-situated shippers. See *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. at 495. Intervening plaintiffs allege discrimination, but in the *Koppers* Case, such an allegation did not render the general increase orders reviewable in the absence of a final Commission order in a complaint proceeding. Intervening plaintiffs were not harmed simply because the Commission allowed inclusion of the differential grain rates in the general revenue increase. In such a massive proceeding, the Commission cannot be expected to examine the rate structures of particular commodities to uncover every potential instance of undue discrimination. 332 I.C.C. at 750; *Increased Freight Rates, 1967*, 332 I.C.C. 280, at 300 (1968); see also, *United States* v. *Louisiana*, *supra*, 270 U.S. at 77, where the Supreme Court recognized the impracticality of examining particular rates in a general revenue case.

The mere fact that a higher rate is instituted through the device of a general revenue case does not subject plaintiffs to legal injury. Here the railroads exercised their statutory right to initiate rate increases, *Algoma Coke & Coal Co.* v. *United States*, *supra*, 11 F.Supp. at 493, and the Commission merely agreed to vacate its suspension order if these rates were included in a general increase

based on revenue need. Moreover, the Commission specifically refrained from approving individual rates and emphatically stated that any particular rate would be subject to complaint proceedings under Sections 13 and 15. Thus, the order here challenged does not, by itself, injure plaintiffs or threaten them with an injury in any way entitling them to judicial review. *Algoma Coke & Coal Co. v. United States, supra,* 11 F.Supp. at 495-96; *Koppers Co. v. United States, supra,* 132 F.Supp. at 162-63. See generally, Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, at 371 (1968).

Plaintiffs have thus failed to allege adequate grounds for invoking judicial review of the Commission's order. The Commission was within well-recognized bounds of discretion in approving the general increase procedure requested by the railroads, and it did not approve the specific rates assailed by plaintiffs. Plaintiffs admittedly have not pursued their statutory remedy before the Commission, and an allegation that one rate may be unjust and unreasonable does not render reviewable an order concerning the general rate structure.

Conclusion

For the foregoing reasons, plaintiffs' complaints should be dismissed for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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Memorandum of Aberdeen and Rockfish Railroad Company, et al., Intervening as Defendants, In Support of Defendant Interstate Commerce Commission's Motion to Dismiss.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

In this case the railroads which were before the Interstate Commerce Commission in its *Ex Parte 259* proceeding have intervened in support of that Commission and of its orders of November 25, 1968 and January 9, 1969 in the *Ex Parte 259* case.

In answer to the complaint by which plaintiffs and intervening plaintiffs seek to set aside those orders the Interstate Commerce Commission affirmatively asserted the defense that the complaint does not state a cause of action. The railroad intervenors as defendants raised the same defense by denial of allegations in the complaint. The court has expressed a desire to determine the merits of that defense.

The Interstate Commerce Commission is filing its motion to dismiss for failure to state a cause of action and is also filing its statement of material facts pursuant to Rule 9(g) of this Court's general rules. The railroad intervenors as defendants adopt the statement of material facts filed by the Commission and submit this memorandum in support of the motion to dismiss.

Railroads' Memorandum in Support of Motion to Dismiss

I.

The Ex Parte No. 259 Case.

As stated in the reports of the Interstate Commerce Commission in *Ex Parte 259, Increased Freight Rates, 1968*, 332 ICC 590, 332 ICC 714 (attached to intervenors' complaint as Appendices A and B), the increased rates proposed by the railroads in the tariffs filed by them are necessary because:

> "There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect." (332 ICC at P. 790)

The railroads had not increased their rates during the years 1960 to 1967. See *Ex Parte 256, Increased Freight Rates, 1967*, 329 ICC 854, 865. In fact, contrary to the general trend of the economy, the railroads had reduced their rates during that period. (See the table in Appendix A to intervenors' complaint, 332 ICC at P. 603)

However, beginning early in 1967 the patterns of wage settlements and material prices were such that the railroads were forced to increase their rates. In its report the Commission found that the increased costs of the railroads on an annual basis over the 1966 cost level were approximately

$855.4 million (332 ICC at P. 599-600) and further found that:

> "The *Ex Parte No. 256* rate increases, at the constructive year traffic level, should be generating approximately $300 million in increased freight revenue, which leaves $555.4 million in increased expenses to be met by the *Ex Parte No. 259* increases in rates and charges. Respondents estimate that . . . if all of their proposed increases become effective, they will produce . . . an aggregate of $466.2 million . . . Approval of the entire rate adjustment would thus leave respondents short by at least $89.2 million of annual revenue needed simply to cover their increased expenses." (332 ICC at P. 602)

The Commission was concerned regarding these large increases in costs because the railroads' rates of return on net investment in recent years have been, in the words of the Commission, "clearly inadequate." Those inadequate rates of return were: (332 ICC at P. 603)

	1966	1967	1968[1]	Constructive Year[1]
Eastern District	3.53	1.58	1.77	2.37
Southern District	4.55	3.86	3.65	4.36
Western District	4.03	2.75	2.93	3.35
United States	3.90	2.45	2.58	3.12

1. Rate of return for 1968 and for the constructive year estimated. The constructive year estimates are based on estimated 1968 traffic levels at the cost level for the last 6 months of 1968 and at the rate level including the *Ex Parte 259* tariff increases.

Even counsel for complainants here, in representing those clients before the Commission in the *Ex Parte 259* case,

seemed to share the Commission's concern about the low rate of return. He stated:

> "There is no denying that certain railroads are in dire straits . . ." (Tr. 180)

and

> " . . . admittedly, a four percent rate of return would be inadequate by today's standards . . ." (Tr. 183)

Neither the complaint nor the intervening complaint herein alleges any error on the part of the Commission in finding that the railroads had an urgent need for additional revenue; that their rates of return are "clearly inadequate"; and that the increased rates initiated by the railroads would fall short of covering their increased costs.

II.

Relief Sought by Plaintiffs and Intervening Plaintiffs.

Plaintiffs and intervening plaintiffs allege that by the *Ex Parte 259* tariff the railroads put into effect freight rate increases which range from 3% to 10% on virtually all commodities shipped within the United States, including an increase of 5%, maximum 15 cents per ton, on bituminous steam coal and an increase of 6% on grain, feed and feed ingredients moving into Northeastern States. (Compl. Par. 6, Intervening Compl. Par. 6)

Representing themselves to be interested in the rates on bituminous steam coal to certain electric utility power stations to which their freight charges were allegedly increased $2.7 million annually, the seven utility plaintiffs seek to enjoin the orders of January 9, 1969 and November

25, 1968. (Compl. Par. 1 and Prayer) As plaintiffs seem to construe the order, the injunction would deny the United States railroads urgently needed annual revenues of approximately $466.2 million which the Commission found the *Ex Parte 259* tariff increases would produce. (332 ICC at P. 602) Similarly, intervening complainants seek to enjoin the orders of January 9, 1969 and November 25, 1968 in their entirety. (Intervenors' Compl. Par. 4 and Prayer)

III.

The Complaint should be dismissed.

A. Under the Interstate Commerce Act Railroads Have the Right to Initiate Rate Changes.

The Interstate Commerce Act, 49 USC §1 *et seq.*, sets forth a comprehensive, regulatory scheme containing standards of lawfulness to which freight rates must conform and empowers the Interstate Commerce Commission to secure compliance with those standards. However, under the statutory plan the railroads may initiate and publish freight tariffs containing new or changed rates. As noted by the Supreme Court:

> "A carrier is entitled to initiate rates, and in this connection, to adopt such policy of rate making as to it seems wise . . ." *United States* v. *Illinois Central R.R.*, 263 U. S. 515, 522 (1923).

Of course, rail rates must be filed with the ICC pursuant to Section 6 of the Interstate Commerce Act. (49 USC §6) During the fiscal year ended June 30, 1968, the railroads filed 75,128 freight rate tariffs with the Commission.[2] During that year the Commission was petitioned to suspend 401

2. 82nd Annual Report of ICC, P. 34.

rail rate adjustments. However, in the exercise of its discretion under Section 15(7) of the Interstate Commerce Act [49 USC §15(7)], the Commission suspended only 110 rail rate adjustments in full or in part.[3] This indicates that the railroads' rate structure is largely initiated by the railroads. Even the Commission's power to interfere with the railroad publication of rate changes is limited and the court may not enlarge or interfere with the Commission's exercise of its discretionary powers under Section 15(7) of the Act. See *Arrow Transp. Co. v. United States*, 372 U. S. 658 (1963).

B. Procedures before the Interstate Commerce Commission.

The Commission's *Ex Parte 259*[4] proceeding began on March 7, 1968, when the Class I railroads of the United States[4] petitioned the Commission for relief from the Commission's own regulations as to the form in which tariffs must be published.[5] These regulations are not statutory, although the Commission's authority to issue such tariff rules and regulations is found in Section 6 of the Interstate Commerce Act (49 U.S.C. §6). That section provides that the Commission may in its discretion allow the filing of tariffs that depart from the form required by Commission regulations. [Section 6(3)]

By order entered March 8, 1968 the Commission granted the ministerial relief requested by the railroads, which

3. Ibid. 29.

4. Also some railroads of other classes and some water and motor carriers that maintain joint rates with the railroads.

5. The petition also requested modification of outstanding orders of the Commission and new and modified fourth section relief (49 U.S.C. §4), but these were merely ancillary to the publication of the rates.

relief merely allowed the railroads to file the tariffs to become effective 75 days after filing. However, the tariffs remained subject to suspension and investigation by the Commission. The tariff was filed to become effective May 24, 1968. The railroads, in cooperation with the Commission, voluntarily postponed the effective date to June 19, 1968.

On March 12, 1968 the Commission issued an order setting special rules of procedure. The order authorized the filing of verified statements in support of and in opposition to the petition and the filing of reply verified statements, to be followed by briefs and oral argument on the question of whether the *Ex Parte 259* tariff should be suspended, investigated, or allowed to go into effect without suspension or investigation.

Following oral argument on June 13-14, 1968, the Commission elected to suspend the effectiveness of the *Ex Parte 259* tariff for the statutory seven-month period allowed under Section 15(7) of the Act. Its order of June 19, 1968 suspended the tariff until January 23, 1969 and instituted an investigation. The suspension order was without prejudice to the publication in another tariff of increases which did not exceed 3%.

On July 3, 1968 the Commission entered a special procedural order assigning the case for hearing in ten sub-numbered parts before four hearing examiners. Sub No. 2 involved Railroad Cost and Revenue Need and Sub Nos. 3-11 involved one or more commodities or commodity groups. Extensive hearings were had in which the Commission was called upon to consider a mass of evidence and many contentions.[6] The Supreme Court recognizes the

6. Hundreds of parties participated in the Commission proceeding. The direct testimony of all parties was presented in 496 verified statements containing thousands of pages of testimony and statistics in addition to 4349 pages of transcript taken at the hearings.

practicalities of the ICC's regulatory problem in revenue cases such as this. See *United States* v. *Louisiana*, 290 U.S. 70, 77 (1933), where the court said:

> "* * * in performing the duty broadly to increase carrier revenue, it is enough if the Commission in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation cannot be marked by this court with certainty."

See also *New England Divisions Case*, 261 U.S. 184, 197-198 (1923), where the court said:

> "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, §12, 36 Stat. 539, 551, 552, to be upon the carrier.[18] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new §15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases * * *" (261 U.S. at Pp. 197-198) [footnotes omitted]

The Commission received briefs from all parties on or before November 12, 1968 and on November 25, 1968 entered its interim order in which it vacated the suspension order of June 19, 1969 (with exceptions on a few commodities not involved here). The final order entered January 9, 1969 and printed at 332 ICC 714 ordered the railroads to cease and desist from making effective a few of the increases that were published in the *Ex Parte 259* tariff, and except for those few changes, which are not involved here, vacated the suspension orders.

The Commission also modified outstanding orders in other cases which might prohibit the increases contained in the *Ex Parte 269* tariff and issued relief from the provisions of Section 4 of the Act. However, those actions were merely incidental to the tariff publication. Plaintiffs and intervening plaintiffs have never addressed themselves to any issues under Section 4, nor have they claimed that they were affected by any outstanding orders.

In short, the increased rate tariff was initiated by the railroads; it was suspended by the Commission; the suspension was vacated and the tariff became effective by its own terms. They are railroad-initiated rates. The Commission specifically stated that the rates are not Commission prescribed or established. The Commission found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the

> decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects be subject to complaint and investigation as provided by the act." (332 ICC at P. 792)

The permissive nature of the Commission's action in vacating suspension of the *Ex Parte 259* tariff is stated in its report as follows:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed * * *" (332 ICC at P. 715)

C. Precedent Requires Dismissal

This case is controlled by the precedent in *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

In that case a three-judge District Court was requested to enjoin and set aside orders of the Interstate Commerce Commission entered in a general revenue increase proceeding—*Ex Parte 115, Emergency Freight Charges, 1935*, 208 ICC 4. In that case, the Commission, as here, approved increases in rates on a selective basis "to meet in part increased expenses of operation caused by an increased wage scale and rising costs of materials and supplies." (11 F. Supp. 489)

In approving the increases, the Commission made the following findings and issued the following orders—all of

which are couched in language similar to like findings and orders in *Ex Parte 259*:

> " . . . we find that the present rates and charges, as increased by the emergency charges here authorized, will not be in excess of just and reasonable rates for a period to terminate June 30, 1936." (208 ICC at P. 60)
>
> "It should be clearly understood that the plan of emergency charges here provided is permissive in character." (208 ICC at P. 59)
>
> " . . . the resulting rates will in all respects be subject to complaint or to investigation and to determination as to the lawfulness of schedules or rates, as provided by the act. In applicants' closing brief, they concede in effect that the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, will have no application to increases in rates such as those which we authorize." (208 ICC at P. 60)
>
> "As in *Ex Parte No. 103*, we shall grant the necessary authority under Section 6 for filing blanket supplements, embodying the emergency charges here provided for . . ." (208 ICC at P. 60)
>
> " . . . we shall enter an order authorizing departures from section 4 in order to permit the emergency charges here approved to be established." (208 ICC at P. 61)

Following the issuance of the Commission's order in *Ex Parte 115*, a group of 179 plaintiffs representing coal interests filed suit to suspend, annul, and set aside those orders. In a well reasoned opinion the court dismissed the complaint.

The court first took note of the permissive nature of the relief granted by the Commission. It said:

> "In the first place, it is to be noted that the only orders passed by the Commission were for fourth-section relief and modification or suspension of existing rate orders of the Commission; and that these two orders are of themselves purely incidental to the main purpose of the proceeding before the Commission. Furthermore, it is to be noted that it is not clearly shown by the plaintiffs that they suffer any injury by virtue of these particular orders, which were merely a means to an end. The end itself, and the chief result of the proceeding before the Commission was merely to give permission to the carriers to file 'master' tariffs, carrying the increased rates, which the Commission determined, in the exercise of its discretionary power, it would not suspend. It is true that the roads asked for relief in a more positive and definite form, but this was denied by the Commission. The report of the Commission distinctly states that the plan of emergency charges is permissive in character and that the resulting rates initiated by the carriers 'will in all respects be subject to complaint and investigation to determine the reasonableness of the schedules and rates as provided by the Act'; and that what the Commission decided will not debar the plaintiffs from reparation orders in proper cases. *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 270, 52 S. Ct. 183, 76 L. Ed. 348.
>
> "The result of the Commission proceedings, therefore, was merely to permit the railroads to initiate new rates." (11 F. Supp. at Pp. 492-493)

Note at this point that the Commission's action in *Ex Parte 259* is similar to that before the court in *Algoma*. It entered orders ". . . modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary" (332 ICC at P. 792). With respect to the permissive nature of its orders, the Commission said:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." (332 ICC at P. 715)

Having discussed the nature and effect of the proceeding before the Commission, the court in *Algoma* went on to say:

> "The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact. If this were really the situation confronting the court, it is clear enough as a result of recent Supreme Court decisions that the order of the Commission should be set aside if the plaintiffs have a standing to invoke that relief." (11 F. Supp. at P. 493-494)

> "As already pointed out, in our opinion this misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (49 U.S.C.A. §13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates." (11 F. Supp. at P. 494)

The court then found that the action of the Commission in passing orders for fourth section relief and modifying its tariff rules was a matter within its administrative discretion and went on to comment:

> "As has been pointed out, it is not shown that these two orders prejudicially affect the plaintiffs. What does affect them is the failure of the Commission to suspend the new rates. But this again was clearly within the administrative discretion of the Commission under section 15(7) of the Act. (49 (U.S.C.A. §15(7)). Speaking of this, in Board of Railroad Commissioners *v.* Great Northern Ry. Co., 281 U.S. 412, 429, 50 S. Ct. 391, 396, 74 L. Ed. 936, the Chief Justice, for the Supreme Court said: 'Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, §15(7); 36 Stat. 552; 41 Stat. 486, 487 (49 U.S.C.A. §15(7)). This power of suspension was intrusted to the Commission only.'

> From this it appears clearly enough that if the Commission in its discretion does not suspend the new rates, the courts have no power to do so." (11 F.Supp. at P. 495)

See also *Arrow Transp. Co.* v. *United States*, 372 U.S. 658 (1963); and *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605 (D. Delaware, 1959) vacated in part as moot 364 U.S. 280 (1960), for a discussion of the discretionary nature of the Commission's suspension powers.

The Court concluded the plaintiffs had no status to maintain the action as they had no independent legal right which was prejudicially affected by the Commission's orders. The court then relegated the plaintiffs to their proper statutory remedies stating:

> "The plaintiffs have mistaken their remedy in the statutory scheme of railroad rate making. Their contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiffs' particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all the railroads in the country. If the increased rates as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13 and 15 of the act (49 U.S.C.A. §§13, 15) for individual relief, and for reparation orders under section 16(1) of the act." (11 F.Supp. at Pp. 495-496)

The *Algoma* precedent has been followed in two other three-judge court proceedings, *Koppers Company* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955) and *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956) affirmed per cur. 352 U.S. 1021.[7]

In *Koppers* the Commission's order in a general revenue increase proceeding known as *Ex. Parte No. 175, Increased Freight Rates, 1951*, 284 ICC 589, was under attack. The court, quoting at length from *Algoma*, dismissed the complaint stating:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits. (132 F. Supp. 163)

In *Florida Citrus*, the court dismissed a complaint against a Commission order permitting nationwide increases in refrigeration charges. *Proposed Increased Refrigeration Charges*, 289 ICC 505.

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7. See also *Birmingham Slag Company* v. *United States*, 11 F. Supp. 486 (N.D. Ala. 1935) in which the court dismissed a complaint against the Commission's order in *Ex. Parte No. 115* on grounds similar to *Algoma*.

The court said:

> "As in the *Algoma* case, the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided." (144 F.Supp. at P. 523)
>
> "On the theory that we have under review a rate case rather than a revenue case, the plaintiffs assert they will have no opportunity for redress from the discriminatory effects of the increases in the charges as applied to specific situations unless we set aside the Commission's order. But, it appears, the plaintiffs, in this case as in *Algoma Coal & Coke Co.* v. *United States*, *supra*, and in *Koppers Company* v. *United States*, D.C.W.D. Pa. 1955, 132 F.Supp. 159, 161, have mistaken their remedy." (144 F.Supp. at Pp. 525, 526)
>
> "It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348. Cf. *Atlantic Coast Line Railroad Co.* v. *State of Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L. Ed. 1451. But this rule has no application under the permissive provisions of an order in a general revenue case such as is this case. Supported by substantial authority it was held in the *Algoma* case [11 F.Supp. 496] 'If the increased rates, as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13

and 15 of the act (49 U.S.C.A. §§ 13, 15) for individual relief, and for reparation orders under section 16(1) of the act (49 U.S.C.A. § 16(1)). [Citing cases.] Nothing in the Commission case debars them from such relief.' This, we think, as expressed by the Secretary of Agriculture, is the law of the land, and it is applicable to the instant case." (144 F.Supp. at P. 527)

Conclusion

For the reasons herein stated the complaint should be dismissed.

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PLAINTIFFS'* MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

I.

Statement of Plaintiffs' Position.

Defendant, Interstate Commerce Commission ("Commission" or "ICC") moved this Court to dismiss the complaints in this proceeding on the ground that they each fail to state a claim upon which relief can be granted. Thus, the sole issue before the Court for decision is whether the facts alleged *in the complaints* set forth such a claim. Plaintiffs maintain that they do, since the facts alleged constitute violations of plaintiffs' Constitutional and statutory rights for which they are legally entitled to redress.

Therefore, it is most important for this Court to have clearly before it the exact facts alleged in the complaint, particularly since they have been inaccurately described and characterized by the defendant Interstate Commerce Commission in its "Memorandum in Support of Defendant's Motion to Dismiss," and because the intervening defendant railroads, in their "Memorandum in Support of Defendant ICC's Motion to Dismiss", have discussed alleged facts

* As used herein, "Plaintiffs" refers to the original plaintiffs to this action, seven eastern public utilities. While both the plaintiffs and the intervening plaintiffs maintain that the motion to dismiss must be denied, separate memoranda appear desirable, particularly in view of the fact that separate complaints are involved. However, in their memoranda plaintiffs and intervening plaintiffs have endeavored not to repeat each other's arguments in their separate memoranda.

which are not properly before this Court and not in issue here.

The allegations of plaintiff utilities' complaint, which, for the purpose of this Motion, are to be taken by the Court and all parties as established facts, are:

(A) In March, 1968 the Class I Railroads filed with the ICC "Master Tariff X-259", providing for rate increases on virtually all commodities ranging from 3% to 10%, and including an increase of 5% on bituminous steam coal (subject to a 15¢ per ton maximum) (utility plaintiffs' complaint, paragraph 6, hereinafter "¶").

(B) On June 19, 1968 (after allowing an interim overall increase of 3%), the ICC suspended the Tariff to January 23, 1969, and ordered investigatory hearings on the proposed increases (¶6).

(C) At the hearings, there was no evidence as to the justness and reasonableness of the proposed rates. The Commission did not itself affirmatively examine into the justness and reasonableness or other aspects of the proposed increases (¶9). No Bureau, Section, or employee of the ICC was a party to the proceedings nor was there any representation of the public interest by the ICC through its counsel or otherwise (¶10). There was no evidence by the railroads as to their costs for providing the transportation services involved with respect to any particular commodity; although such evidence was requested by plaintiffs throughout the proceedings, it was repeatedly refused by the railroads, which refusal was upheld by the ICC (¶12). There was no evidence in the record to rebut evidence presented by shippers that substantial loss of traffic would result from the proposed increases (¶13). There

was no evidence presented by the railroads to justify an increase of 5% on coal as compared to 3% on certain other commodities (¶14); but there was substantial and uncontroverted evidence that coal traffic, prior to such an increase, produced a disproportionate return to the carriers over and above the cost to them of providing that service (¶14).

(D) By the Order of January 23, 1969 (hereinafter "Order"), the ICC permitted the railroads to put into effect virtually all of the increases for which they had provided in the Master Tariff, specifically finding that the increased rates "will not exceed a maximum reasonable level," and that they "will have no undue adverse effect on the movement of traffic."

(E) The ICC based its findings respecting the effect of movement of traffic upon its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (332 ICC 734), for which opinion there is no supporting evidence, and upon the explicit assumption that "should competitive situations arise, appropriate adjustments can be made by producers and carriers", although there is not a scintilla of evidence in the record to support an assumption that "adjustments can be made by producers" (332 ICC 734).

(F) The plaintiffs are required by the Order to pay approximately $2,700,000 per year additional for the shipment of coal (¶5).

It should be clear from the foregoing that plaintiffs are *not* seeking to litigate the justness and reasonableness of increased coal freight rates which the railroads put into effect pursuant to the Commission's Order. They are seeking review of the methods used and record relied on by

the Commission in deciding that the increased rates proposed by the railroads were just and reasonable, and that those increased rates would not adversely affect the movement of traffic. It is the position of plaintiffs, and an established fact for the purposes of this Motion, that on the record made before the Commission (devoid of relevant proof) the Commission *could not determine* whether the rates were just and reasonable; nor could it determine the effect of such rates on movement of traffic. In the absence of a record adequate to make such affirmative findings, the Commission was required by the Interstate Commerce Act to disapprove the proposed changed rates (§§1(5), 15a(2)). Since the inadequacy of the record in this regard is admitted by the Motion, the sole issues are: 1. Is the Order approving changed rates in error, and 2. Is that Order reviewable.*

* In the ICC's "Statement of Material Facts Not in Dispute", paragraph numbered 9 states that:

> "Plaintiffs and intervening plaintiffs elected not to seek Commission review *of these rates* under Sections 13 and 15 of the Interstate Commerce Act (49 U.S.C. §§13 and 15) and *instead* filed this lawsuit."

"Of these rates" in paragraph #9 must refer to all of the rates permitted to be increased by the Commission's Order. A §§13 and 15 proceeding can be used only to attack the reasonableness of a rate. Plaintiffs are not seeking review of the reasonableness of coal and grain freight rates, they are seeking review of the Commission's method of determining that the proposed increases would result in just and reasonable rates. It may also be noted that paragraph numbered 5 in that document states that the railroads filed new tariffs in March, 1968, proposing "certain increases in the general level of freight rates," which may be slightly misleading. The tariffs proposed a multitude of specific increases, varying from 3% to 10%, in existing rates on virtually every commodity carried by the railroads. There is nothing contained in the tariffs relating to any "general level" of rates.

Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

II.

The Order is in Error Because it Violates the Constitutional and Statutory Rights of Plaintiffs

Plaintiffs agree with defendant Commission that when the railroads filed their Master Tariff X-259 in March, 1968, the Commission could have decided, without a hearing, to allow those rates to go into effect merely by refusing to suspend them (49 U.S.C. §15(7)). Plaintiffs also do not contest defendant's contention that such Commission action would have been clearly discretionary under the statute and would not have been judicially reviewable (*Arrow Transportation* v. *Southern R. Co.*, 372 U.S. 658 (1963)).

However, instead of merely allowing the rates to go into effect, the Commission ordered investigatory hearings. Once that order was made, the Commission was then bound to conduct that hearing in accordance with the Constitutional standards of due process and in conformity with the requirements of the Administrative Procedure Act and the Interstate Commerce Act. This it failed to do.

A. The Commission Violated Plaintiffs' Constitutional Rights by Delegating Its Function to Interested Private Parties and by Making Findings Not Founded on the Record.

The attitude of the Commission throughout its proceedings, as the complaints show, can be described by a paraphrase of a now-famous line—what's good for the railroads is good for the public—and a firm belief that the railroads know what's good for themselves. This philosophy, however, ignores the fact that the Commission has statutory duties to perform, and the plaintiffs have statutory and

Constitutional rights which preclude delegation of those governmental functions to private interested parties.

The most revealing exposition of this Commission philosophy is found in the facts stated in ¶13 of the utility plaintiffs' complaint. The Act specifically requires the Commission to give consideration to the adverse effect of increased railroad rates on the movement of traffic (§15(a)(2)). Voluminous evidence was presented by shippers that substantial loss of traffic would result from the increases—a fact which, of course, would not *per se* require rejection of the tariff but certainly, when combined with the statutory mandate, required some rebuttal by the carriers and independent review of the situation by the Commission.

However, there was no evidence at all from the carriers to rebut the shippers' proof (¶13). And the Commission attempted to discharge its duty by speculating that with respect to coal traffic "costs of other forms of transportation, and of competing fuels are also increasing" (332 ICC 734), for which there is no support in the record, and with a statement that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (332 I.C.C. 734). Since there is not a scintilla of evidence in the record regarding the ability of coal producers to make "adjustments", it is clear that the Commission attempted to discharge its duty by delegating to and accepting the judgment of the "carriers" as to whether the increases would result in rates that would reduce traffic volumes; and it also left to them the responsibility of determining and making whatever "adjustment" the carriers found "appropriate."

Plaintiffs' Constitutional rights have thus been violated in two respects. First, it is fundamental that a govern-

mental agency cannot delegate its duties to private interested parties, as the Commission here delegated to the carriers its own duty to determine the "competitive situation" and to make "appropriate adjustments." (*Lathrop* v. *Donohue*, 367 U.S. 820 (1961), *Matter of Fink* v. *Cole*, 302 N.Y. 216 (1951); *Group Health Ins. of N.J.* v. *Howell*, 40 N.J. 436, 193 A.2d 103 (1963)).

Secondly, due process requires that findings be based on substantial evidence in the record (*Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 706(2)(E)). If there was some special "expertise" from which the Commission had knowledge *outside* the record regarding "costs of other fuels" or of "competing transportation"* it should have been indicated in the findings together with any special knowledge in its possesion regarding the ability of coal producers to make adjustments (5 U.S.C. § 552, *B. & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968); *Gonzalez* v. *Freeman*, 334 F.2d. 570 (D.C. Cir. 1964)).

Similarly, there was no evidence in the record presented by the carriers as to the justness and reasonableness of the proposed rates (¶9), nor was there any evidence as to the cost of providing transportation services for any commodity (¶12). In these circumstances, the Commission should have held that the carriers had not met their statutory burden of proof and rejected the proposed change in rates. Instead, it proceeded to find, without evidence, that what the carriers wanted was "just and reasonable."

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* This would include, in this connection, non-ICC regulated carriers, such as oil tankers.

B. The Commission Violated Plaintiffs' Statutory Rights by Failing Itself Affirmatively to Develop an Adequate Record.

The Commission failed in its statutory duty to regulate affirmatively. Section 17(3) provides as follows:

> "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the *ends of justice*." (49 U.S.C. § 17(3), emphasis added).

Despite the foregoing, the Commission accepted the railroad's proposals, involving $470,000,000 in annual rate increases, without any bureau or section of the Commission being a party to these proceedings nor having the Commission represented by counsel.

The lack of Commission Staff participation necessarily resulted in an inadequate record because much vital statistical information on the railroads' current and past operations is provided to the Commission's Bureau of Accounts on a confidential basis and was not and is not availible to the shippers who are parties to this proceeding.*

The Commission noted that with respect to loss of traffic resulting from increases, predictions of the parties "are always dramatically opposed", opined that they thus have "limited probative value" and that therefore "evidential support more reliable and persuasive" would be required before an increase could be denied on this ground (332 I.C.C. 716). In light of its view of the "limited probative

* Whether or not the Commission utilized this *ex parte* information in arriving at its decision can only be guessed at; if it did, it was of course wholly improper (see case cited *supra*).

value" of evidence presented by the parties, an independent examination by the Commission was clearly called for; instead, the Commission made affirmative findings supinely accepting the opinions of one of the parties, the carriers, and rejecting what was in fact "voluminous, detailed and specific evidence" by the shippers (complaint paragraph 13).

It is well established that the Commission should be the "guardian of the public interest" in such proceedings as those in issue here, with an affirmative duty to protect that interest. However, that interest was accorded no protection whatsoever by the Commission in the Ex Parte 259 hearings.

The Commission has only recently been exhorted by the Supreme Court of the United States to better protect the public interest, (*Baltimore & Ohio Railroad Co.* v. *U. S. et al.*, 386 U. S. 372 at 436, Brennan, J., concurring opinion, (1967)):

> "Ultimately, however, the reason reliance upon the estimates of railroads of their own best interests is objectionable is simply that *the best interests of the railroads are not necessarily consistent with the public interest, and it is the latter which the Commission is directed to advance* . . . . The commendable industrial statesmanship demonstrated by the railroads on many occasions in these recent proceedings only serves, because of the cohesion this demonstrates . . . to aggravate the danger that 'grows out of the tendency of these giant corporations to compromise their own differences at the expense of the unorganized public' 2 Davis op. cit. supra [Admin. L.] 378. The regulatory agency must be the bulwark

against such compromise. It is 'a requisite for administrative viability' that '[t]he outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests.' I.C.C. *v.* Chicago, R.I. & P.R. Co., 218 U.S. 88, 103". (Footnote omitted, emphasis supplied.)

In that same concurring opinion, Justice Brennan also said (at 429):

"The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944); see Southern Class Rate Investigation, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best serves the public interest.* To the same end, the agency

* "'A regulatory body such as the Interstate Commerce Commission cannot properly discharge its duty if it remains ignorant of relevant facts simply because they were not introduced in evidence. The Commission should itself supply deficiencies in the record. It should bring to light material which the parties have either overlooked or have willfully failed to call to its attention. It should aid those parties who through lack of resources are unable adequately to present their cases. It should make full use of the expert knowledge of commissioners and staff, and of the mass of transportation information that it has accumulated through the years.' H.R. Doc. No. 678, *supra*, p. 70. See *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U.S. 194, 208-210, 212, 216-217." (Footnote in original).

> has wide latitude in fashioning procedures, and a broad power to condition its approval of proposals. In other words, the ICC is not the prisoner of the parties' submissions.*"

Despite such statements from the Supreme Court the Commission assigned no lawyer from its staff to participate in these proceedings, nor did it call upon the expertise of such of its divisions as the Bureau of Accounts or the vast store of information available to it in its own files to make the record adequate.

Several law review articles have noted this Commission as the outstanding example of an administrative agency that fails to provide adequate protection for the public interest. For example, Ernest W. Williams, Jr., Esq. in an article relating to the Interstate Commerce Commission stated:

> "The more positive approach which the [Interstate Commerce] Act seems to require of the Commission will in most instances necessitate an enrichment of the record beyond the testimony and exhibits of the parties. In part the Commission may accomplish this by taking official notice of material in its files or otherwise available to it—a method which has been unnecessarily restricted in the ICC's practice.** In addition, the Commission must in strategic cases assign its limited staff resources to the task of preparing material which goes beyond the evidence supplied by the parties and examiners should do more

* (Footnote omitted).

** "See Davis, *Official Notice*, 62 Harv. L. Rev. 537 (1949)."

research following hearings and pending their reports*" (63 Harv. L. Rev. 1349, 1366 (1950)).

Professor Kenneth Culp Davis, a leading authority in the field of administrative law, has written as follows:

> "Congress has assigned to each regulatory agency the affirmative duty of securing all relevant information, whether produced by the parties or not.** The very reason for the creation of most regulatory agencies was the need for providing effective representation for a public interest not otherwise represented, a need which courts because of their passive character could not supply. *'One of the main reasons for the creation of the [Interstate Commerce] Commission,' observed Commissioner Eastman in a formal report, 'was the protection of those public interests which are rarely equipped for self-protection.'*"***

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* "'The I.C.C.'s habit of determining vital transportation policies almost exclusively on the basis of material supplied by private groups inevitably tends to warp the policies in favor of those who are most strongly represented and against the inadequately represented public interest.' *Id.* at 545; *cf.* Curry, *The Future Place of the Examiner in the Interstate Commerce Commission*, 17 ICC Pract. J. 309, 313 (1950). The task of the overloaded examiner in ascertaining that the public interest is appropriately reflected is little assisted by any formal tools."

** "See Landis, The Administrative Process 38-39 (1938): 'The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy upon the record as made by the parties . . . for [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as "rightly" as possible, *independently of the formal record the parties themselves produce.* The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."

*** "Southern Class Rate Investigation, 100 I.C.C. 513, 603 (1925)."

Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

"The regulatory agency's responsibility for taking the initiative in representing the public interest involves a small segment of one of the major enigmas of modern democratic government. The process of compromise that we call democracy usually concerns interests of powerful organizations. A danger increasingly felt grows out of the tendency of these giant organizations to compromise their own differences at the expense of the unorganized public. A basic challenge is to find methods and machinery which will protect against this danger. One of the chief governmental devices for meeting this challenge is the regulatory administrative agency. *The prime weakness of the regulatory agency* is not the much-publicized tendency toward governmental excesses but *is the little-recognized tendency of the agency sooner or later to succumb in greater or lesser degree to the persuasions of powerful groups that are supposed to be regulated.* This weakness is immeasurably aggravated if the agency must decide particular cases exclusively upon the basis of materials supplied to it "by private interests. Yet that is usually the practical result of applying to the regulatory agency the traditional doctrine of judicial notice.*" (Davis, "Official Notice," 62 Harv. L. Rev.,

* "Of course the agency's responsibility for protecting the public interest must be carried out in many ways in addition to assuring that the exclusive reliance will not be on facts brought in by those who are most powerfully organized. Official notice affects only a small facet of the large problem.* *For instance, the ICC has power to appoint special counsel to represent the public interest in any proceeding;* when the work of such counsel is effectively carried out, the special need for resort to extra-record materials may disappear. The same is true when staff members are required to conduct a sufficient prehearing research." (Emphasis added.)

537, 542-3 (1949)) (Emphasis added both in text and footnotes).

Interstate Commerce Commissioner Aitchison's statements concerning the obligations of administrative agencies to themselves develop an adequate record, as set forth in the Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess., Apr. 29, 1941, 412 at 465-6, have been quoted with approval by a Federal Court of Appeals and by a Federal District Court:

> "They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are "adduced when the parties have not put them in. This requires and authorizes a sufficient survey of matters within the agencies files, and a reasonable use of the technical expertness and advice of members of the agencies staff . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . ."

Isbrandtsen Co. v. *U. S.*, 96 F. Supp. 883 at 892 (S.D.N.Y., 1951, affd. 342 U. S. 950, 1952); and see *Scenic Hudson*

Preservation Conf. v. *F.P.C.*, 354 F. 2d 608 at 621 (2d Cir. 1965), *cert. den.* 384 U. S. 941 (1966).

In the latter case, the FPC staff had taken an active part in the hearings before the examiner, had presented witnesses of its own, cross-examined applicant's and intervenors' witnesses, submitted briefs and exceptions to the examiner's decision, but the FPC was nevertheless reversed by the Court for not testing and supplementing evidence presented by the parties adequately to protect the public interest.

On this same point of the Commission's affirmative duty, in *Aberdeen & Rockfish R. Co.* v. *U. S.*, 270 F. Supp. 695 (E.D. La. (1967), affd. as modified, 393 U. S. 87 (1968)), the Court quoted with approval the language of another District Court as follows:

> "'The [Interstate Commerce] Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with "other interrested and presumably better informed agencies of the Government as to particular question." Cantlay & Tanzola, Inc. *v.* United States, [D. C.,] 115 F. Supp. [72,] 81. However, the record does not disclose that any of those courses was followed in this case. *The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.*'" (Emphasis added by the court.) 270 F. Supp. 695, 711.

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Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

"There is no doubt as to the Commission's statutory powers to require the development of adequate and comparable cost data. Section 12(1) of the Interstate Commerce Act authorizes the Commission to 'obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of [the Act]' (49 U.S.C. §12(1)). Section 20(1) of the Act expressly grants the Commission the power 'to require . . . special reports from carriers' and to require the carriers to provide 'full, true and correct answers to all questions upon which the Commission may deem information to be necessary' (49 U.S.C. §20(1)). This power was sustained in Baltimore & O. R. Co. *v.* ICC, 221 U. S. 612, 621 (1911)." id. at 712.

See also *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 at 226 (D.C. Cir. 1960):

"In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding."

Therefore, the Commission is required by its own statute, and by the Supreme Court and other courts to affirmatively develop an adequate record. Its failure to do so in the past has been severely criticized by the courts and by legal scholars. Despite the proliferation of adverse comment, the Commission persisted in the instant case in again failing to perform this legal duty.

Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

C. Plaintiffs' Rights Were Also Violated by Commission's Failure to Enforce the Burden of Proof Requirements of its own Statute and the Administrative Procedure Act.

Section 15(7) of the Act provides, in pertinent part, as follows:

> "At any hearing involving a change in a rate, fare, charge or classification, . . . after September 18, 1940, *the burden of proof shall be upon the carrier* to show that the proposed changed rate, fare, charge, classification . . . is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." (49 U.S.C. §15(7), emphasis added).

The Administrative Procedure Act, 5 U.S.C. §556(d) provides:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

During the hearing in *Ex Parte 259,* when one of the examiners denied repeated motions made by shippers for the production of additional evidence, particularly on costs, he correctly noted that the railroads had the burden of proof to make out their *prima facie* case, and indicated that if the data they produced was insufficient to do so, the relief they sought would be denied. It is plaintiffs' position here that the railroads' data was completely insufficient to establish that the proposed increases would result in just and reasonable rates. However, the Commission now takes the position that it is *plaintiffs'* duty to bring a §13 or §15

proceeding to show that the proposed rates are *un*just and *un*reasonable!

In any such proceeding, the plaintiffs would clearly have the burden of proof to show that the present approved rates are unjust and unreasonable (*Koppers Co., Inc. v. Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 388 (1958)). It is submitted that to force plaintiffs to follow the §§13 and 15 route is to circumvent the burden of proof requirement which §15(7) so clearly places on the carrier railroad.

Any shipper suing in the Commission pursuant to §§13 and 15 of course will be faced with the decision in Ex Parte 259, which explicitly found that both the proposed rates and proposed level of rates were just and reasonable. In *Koppers, supra*, which was the proceeding in the ICC following the dismissal of the plaintiffs' complaint by the District Court, Koppers' attempts to meet the burden of proof necessary to overcome the decision in Ex Parte 175 were summarily dismissed:

> "The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." (303 I.C.C. 387, 388).

Plaintiffs' Memorandum in Opposition to Motion to Dismiss Complaint

In a recent decision, the Court of Appeals for the District of Columbia, Burger, J., writing the opinion, admonished the Federal Communications Commission in very strong terms that it had a duty to see that the burden of proof was borne by the proper party and sustained by it. See *United Church of Christ* v. *FCC*, 1965 et seq. [Fed.] CCH Util. L. Rep. ¶11609 (D.C. Cir. June 20, 1969).

In effect, what this Commission contends is that by making unreviewable findings without evidence in this proceeding, it may shift the burden of proof from the carriers, where Congress placed it, to the plaintiff shippers. It thereby forces these plaintiffs to prove to the Commission not only that the rates are *un*just and *un*reasonable, but that the Commission's earlier Order was in error. Such an attempt is clearly in violation of the intent and language of the statute.

Under the statute, the rate increases on bituminous steam coal must be shown by the carriers to be justified by specific and relevant record evidence before they can be found to be just and reasonable. However, no such evidence was offered by the carriers.

The railroads must have such data available; they must have determined how much it cost them to ship a trainload of coal before first determining the rate for that service. Nowhere had they denied the ready availability of this data. Certainly, on traffic movements such as these, they could have easily presented the data requested by plaintiffs.

The railroads try to excuse the lack of cost data in Ex Parte 259 by characterizing it as a "revenue" or "general revenue" proceeding (railroads' memorandum pp. 9, 12). However, the fact remains that the carriers increased their rates commodity by commodity, without showing any basis

for the unduly differing increases imposed on various commodities.

In Ex Parte 256, the last general rate increase before Ex Parte 259, the Commission said:

> "The facts reviewed in the preceding paragraphs demonstrate the necessity, in connection with any future general revenue proceeding, for petitioners, in sustaining their burden of proof, to undertake a realistic study of the unit costs of performing transportation services." 332 ICC 280, 285.
>
> • • •
>
> "While the evidence submitted, as hereinafter explained, is sufficient to justify the increases authorized, *we shall expect the petitioning railroads in any future general revenue proceedings to make a more complete disclosure of the facts* upon which they rely in support of the rates sought." 332 ICC at 286 (emphasis added).

The railroads adamantly refused to obey these strictures of the Commission. They submitted the same quantum of proof here as in Ex Parte 256 and repeatedly denied that any further evidence was necessary to make out their *prima facie* case.

The Commission elected, in the decision which plaintiffs here seek reviewed, to ignore its own instructions in Ex Parte 256 and to find that the total costs for all traffic were sufficient to meet its requirements. In so holding, it relied on *U.S.* v. *Louisiana*, 290 U.S. 70 (1933) in which the Supreme Court held that a Commission determination to permit rates to go into effect without "examining into particular rates

in a general revenue case" was acceptable. However, that case was decided under a prior version of §15(a), not the law presently in effect. In the prior statute the Commission was permitted in rate and revenue proceedings to consider the railroads "as a whole," either nationally or in rate groups or territories. Section 15(a) has been amended, however, to remove that provision and it has not been reinserted into the statute. Under the present law, the Commission is instead required to consider the effect of rates on the movement of traffic, and to consider the provision of an efficient transportation service at the lowest cost consistent with the furnishing of that service. "It is difficult to conceive of a reasonable rate which would ignore any one of these considerations." H.R. Rep. No. 193, 73d Cong. 1st Sess., 1933 at 30. Since the law under which *U. S.* v. *Louisiana* is no longer in existence, that case does not provide support for the Commission's decision in Ex Parte 259.

Therefore, plaintiffs' Constitutional and statutory rights have been violated by the Commission because it delegated its function to private, interested parties; made findings not founded on the record; failed to itself affirmatively develop an adequate record; and failed to enforce the legal burden of proof requirement.

III.

The Order of the Commission is Reviewable.

A. This Court is the Proper Forum for Review.

1. The Urgent Deficiencies Act and the Administrative Procedure Act Provide for Review.

The Urgent Deficiencies Act, now embodied in 28 U.S.C. §1336, provides as follows:

"Section 1336. Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Plaintiffs have complied with the procedures set forth in 28 U.S.C. §§2321-2325 relating to actions in district courts to enjoin orders of the ICC.

The Administrative Procedure Act, 5 U.S.C. §702, provides that

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Plaintiffs are adversely affected by the Commission's order to the extent of some $2,700,000 additional they must pay per year for the shipment of coal.

Section 706 of the Administrative Procedure Act empowers the reviewing Court to

"(2) hold unlawful and set aside agency action, findings and conclusions found to be—

. . .

(B) contrary to constitutional right . . .

. . .

(D) without observance of procedures required by law;

(E) unsupported by substantial evidence. . ." (5 U.S.C. §706)

Plaintiffs have demonstrated above that the Commission's Order meets all of the criteria of paragraphs (B), (D) and (E).

The order is thus reviewable under the above statutes. The Supreme Court of the United States has decided this question on three occasions. The first was *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 125 (1939), an appeal from a final decree by a three judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC Order was reviewable because it

> "was not a mere abstract declaration regarding the status of *the Rochester* under the Communications Act [footnote omitted], nor was it a stage in an incompleted process of administrative adjudication." (at 143)

The judgment rendered was a "final and undisputable basis of action as betwen the Commission and the defendant" (at 143). Justice Frankfurter did note that the order could be reviewed to determine "questions affecting Constitutional power, statutory validity and the basic prerequisites of proof". (at 140)

The scope of reviewability set in the *Rochester* case has been expanded by two more recent cases which also arose under the Urgent Deficiencies Act: *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407 (1942) and *Frozen Food Express* v. *U.S.*, 351 U.S. 40 (1956).

In the *CBS* case, the FCC had issued a rule providing for the non-renewal or revocation of licenses of stations whose

contracts with a broadcasting network contained certain proscribed conditions. The Court held the FCC regulation a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this lack of finality, the Court said:

> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend on future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." 316 U.S. 407, 420.

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in the statutory (28 U.S.C. §2325) three-judge court to have the findings and order of the ICC enjoined and set aside. The findings related only to the status of certain agricultural commodities which the Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a Certificate of Necessity, where its carriage before the order was exempt. The possibility that the Commission might issue a cease-and-desist order and the legal consequences thereof were held by the Court to make this determination a reviewable order.

Furthermore, the above cases make clear that the existence of hollow procedured rights (e.g. §§13 and 15) does

not preclude review of an order in which the agency has decided all real substantive rights. We point out that to require the plaintiffs to proceed before the Commission pursuant to §§13 and 15 amounts to denying them any effective relief. Our research has failed to disclose a single instance where any shipper has obtained any adjustment in rates made effective following an Ex Parte Order of the Commission. See ICC language in the *Koppers* case, *supra.*

Justice Burger, writing in *Gonzalez* v. *Freeman, supra* at 575, held that:

> "Action challenged as a denial of due process—whether substantive in the sense of being arbitrary or by capricious classification or procedural in the sense of denying minimum safeguards—could be immune from judicial review, if ever, only by the plainest manifestation of Congressional intent to that effect." *Gonzalez* v. *Freeman,* 334 F2d 570 (1964), *cert. den.* 381 U.S. 904 (1965).

There is no such clear Congressional mandate in this case, but rather specific review procedures provided by Congress in the Urgent Deficiencies Act and the Administrative Procedure Act.

B. Defendants' Contentions that the Order is Not Reviewable Are Without Basis.

1. "Permissive" Nature of the Order.

Both the Commission and the railroads place great weight on the fact that the order of the ICC merely permitted the rates proposed by the railroads to go into effect, and did not

order them to be put into effect. That mere fact, they allege, makes the Order not reviewable. Cited in support of this theory are three cases: *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va. 1935), *Koppers Co.* v. *U.S.*, 132 F.Supp. 159 (W.D. Pa. 1955) and *Florida Citrus Commission* v. *U.S.*, 144 F.Supp. 517 (N.D. Fla. 1956), affd. per curiam 352 U.S. 1021 (1957).

These cases are not relevant here because they challenge the *rates* put into effect, not the *constitutionality* of the Commission's methods of arriving at its order.

The fact, however, that the Order is termed "permissive" by the railroads would not estop this Court from reviewing it.

These cases stand alone amidst literally thousands of cases wherein "permissive" orders have been reviewed by the Courts. These cases include those which come before the ICC relating to railroad mergers. For example, *In the Matter of the Merger of the Penn Central RR and the N. Y. Central RR*, 327 I.C.C. 475, 328 I.C.C. 304, 330 I.C.C. 328, 331 I.C.C. 643, 331 I.C.C. 754 and 334 I.C.C. 25, wherein the Commission finally authorized (i.e., permitted but *did not require*) the merger. The Penn Central merger was reviewed twice by the U.S. District Court for the Southern District of New York, *Erie-Lackawanna RR* v. *U.S.*, 259 F.Supp. 964 (1966), *Erie-Lackawanna RR* v. *U.S.*, 279 F.Supp. 316 (1967), and twice by the Supreme Court of the United States in *Baltimore and Ohio R. Co.* v. *U.S.*, 386 U.S. 372 (1967) and *Penn Central Merger Cases*, 389 U.S. 486 (1968). If this permissive Order was not reviewable, then the courts have been engaged in exercises in futility.

When the I.C.C. authorizes an applicant motor carrier to serve a route, such order is reviewable *Yale T. Corp.* v. *U.S.*,

210 F.Supp. 862 (1962) (aff'd. 373 U.S. 540 (1963)); when the Federal Power Commission authorizes an applicant to construct a hydroelectric plant, that order is reviewable (*Scenic Hudson Preservation Conf.* v. *FPC*, 354 F.2d 608 (2nd Cir. 1965), *cert. den.*, 348 U.S. 941 (1966)); when the FPC authorizes a natural gas company to construct an interstate pipeline, such orders are reviewable (*Skelly Oil Co.* v. *Phillips Petroleum*, 174 F.2d 89 (1949), aff'd. 339 U.S. 667 (1950)); when the CAB authorizes an airline to serve a particular route, such orders are reviewable (*C.A.B.* v. *State Airlines, Inc.*, 338 U.S. 572 (1950)).

All of the above orders are "permissive" in nature: none of them order the applicant to proceed, they merely permit him to. To say that this Court should not review an order merely because it is "permissive" is ridiculous in the face of overwhelming precedent. The railroads have already proceeded under the Order and are collecting the higher rates from plaintiffs.

Furthermore we note that the procedural steps which took place in the Commission in the *Algoma* line of cases are distinguishable from those followed here. Those significant differences are more fully outlined in the memorandum submitted herein by intervening plaintiffs.

2. All administrative remedies have been exhausted.

What plaintiffs are here seeking is review of the Commission's Order of January 23, 1969. In no other manner and in no other forum is that Order reviewable. Upon defendant's theory, no action could be taken by plaintiffs which could make that Order reviewable.

The I.C.C.'s statement herein is devoted to one point only: that plaintiffs may not attack two rates approved by

the Commission in a general increase proceeding. Plaintiffs are not attacking two rates: they are attacking the Commission's Order approving the entire Master Tariff on the grounds that the procedures followed by the Commission in arriving at that Order violated their constitutional and statutory rights. A §13 proceeding would not permit review of these issues.

IV.

CONCLUSION.

The complaint sets forth a cause upon which relief can be granted.

The defendants' motion should be denied.

Respectfully submitted,

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Consolidated Edison Company of New York, Inc.
Niagara Mohawk Power Corporation
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July 28, 1969.

[Certificate of Service Omitted in Printing]

MEMORANDUM OF INTERVENING PLAINTIFFS IN OPPOSITION TO THE MOTION TO DISMISS

In The

United States District Court

Southern District of New York

[Title Omitted in Printing]

Preliminary Statement

Separate memoranda, presenting quite different arguments, were filed in this action by defendant Interstate Commerce Commission ("Commission") and by intervening defendants, Aberdeen and Rockfish Railroad Company, et al. ("Railroads") in support of the Commission's motion to dismiss. While both the plaintiffs and the intervening plaintiffs maintain that the motion to dismiss must be denied, separate memoranda appear desirable, particularly in view of the fact that separate complaints are involved. However, plaintiffs and intervening plaintiffs have endeavored not to repeat arguments in the separate memoranda.

Statement of the Case

In the memoranda filed by defendant Interstate Commerce Commission* and by the intervening defendants, Aberdeen and Rockfish Railroad Company, et al. in support of the Commission's motion to dismiss, the real issue before the Court at this time has been largely obscured.

The question presented by the Commission's motion to dismiss is a simple one: Are the Commission's decisions and orders in this case, made after full investigation and

* Defendant United States of America neither supports nor defends the Commission's order.

hearing, permitting the railroads to increase their freight rates, subject to judicial review?

The answer is equally simple: The law is clear that where the railroads file a new tariff and the Commission, in the exercise of its discretion, permits the new rates to become effective without suspension or investigation, its decision is not reviewable, but that where, as in this case, the Commission does suspend and investigate proposed new rates and, after full investigation and hearing, permits them to become effective, its decision and final order are subject to judicial review.

On March 11, 1968, the railroads filed with the Commission a master tariff and connecting link supplements proposing to increase their freight rates on virtually all commodities by various amounts ranging from 3 to 10 percent. The tariff was originally scheduled to become effective May 27, 1968, but the effective date was voluntarily postponed until June 24, 1968. By order entered June 19, 1968, the Commission permitted the railroads to file a tariff increasing their rates by a uniform 3 percent but pursuant to its power under Section 15(7) of the Interstate Commerce Act (49 U.S.C. §15(7)), the Commission (1) suspended the effectiveness of the tariff proposing increases of from 3 to 10 percent from June 24, 1968, until January 24, 1969, the maximum 7-month period provided for in Section 15(7), and (2) instituted an investigation of the tariffs containing both the suspended and the permitted increases. (332 I.C.C. at 595)

Section 15(7), the statutory provision here involved, provides in pertinent part:

> "(7) Whenever there shall be filed with the Commission any schedule stating a new . . . rate, . . . the

> Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending hearing and decision thereon . . . to . . . suspend the operation of such schedule . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and, after full hearing, . . . the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . At any hearing involving a change in a rate, . . . the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable . . ."

After hearing on the merits, the Commission issued its interim report and order, dated November 25, 1968 (332 I.C.C. 590) and its final report and order, dated January 9, 1969 (332 I.C.C. 714). In its final report, the Commission found (332 I.C.C. at 789-790):

> "Except where specifically otherwise stated we find the proposed increases just and reasonable."

Thus, the Commission's decisions and orders were made after full hearing on the merits in an investigation-and-suspension proceeding under the provisions of Section 15(7). As we show below, such decisions and orders are clearly reviewable, and the motion to dismiss should be denied.

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

ARGUMENT

I.

The Commission's Orders, After Hearing, in Proceedings Under Section 15(7) are Subject to Judicial Review.

Under the statutory scheme of rate-making, the railroads have the right to initiate rate changes. When the railroads file a tariff proposing rate changes and the Commission, in the exercise of its discretion, declines to suspend and/or investigate the new tariff, it is well-established that its action is not subject to judicial review. An objecting party must first file a formal complaint with the Commission under the provisions of Sections 13 and 15 (49 U.S.C. §§13, 15). Only after such a complaint has been dismissed by the Commission may an objecting party seek Court review.

Where the railroads propose limited or minor changes in their rates, the tariffs are immediately filed with the Commission. Where, however, the railroads propose increases in all or almost all of their freight rates, a different procedure is followed. Since it would be a tremendous if not impossible task to re-publish the myriad of tariffs on file with the Commission, the railroads petition the Commission for relief from the tariff-filing requirements of Section 6 (49 U.S.C. §6) in order to file a "master" tariff or tariffs, with connecting link supplements, providing for the proposed general increases. Such authority was sought herein by the railroads on March 7, 1968, and granted by the Commission the following day.

With regard to making the increased rates effective, the railroads have followed two different procedures. Some-

times, as in this case, they initially file the master tariff proposing the rate increases. More often, however, at the time they petition for Section 6 relief, they also petition the Commission to institute an investigation into the adequacy of their existing rates and to authorize increases therein. When this procedure is followed, the Commission considers the petition and issues its report indicating what increases it would consider just and reasonable. Only then do the railroads actually file the master tariff or tariffs providing for the rate increases authorized by the Commission, which are invariably allowed to become effective without suspension and/or investigation. That was the procedure followed in Ex Parte No. 115, *Emergency Freight Charges, 1935*, 208 I.C.C. 4 (1935); Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I.C.C. 589 (1952); and Docket No. 31342, *Proposed Increased Refrigeration Charges*, 297 I.C.C. 505. In all three cases, the Commission declined to suspend and/or investigate the tariffs, published in accordance with its authorization.

Where the railroads have filed such a petition and the Commission has issued an order authorizing increases and has declined to suspend and/or investigate the tariff subsequently filed, it is questionable whether the Commission's action is subject to judicial review. In *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935), which was an appeal from the Commission's decision in Ex Parte No. 115, the Court held that "if the Commission in its discretion does not suspend the new rates, the courts have no power to do so." (11 F.Supp. at p. 495).

The *Algoma* decision was followed in *Koppers Company* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955), which involved the Commission's decision in Ex Parte No. 175.

In that case, however, there were two additional important facts. Koppers had not been a party to the proceedings before the Commission and had already filed a formal complaint under Section 13, which was pending at the time it was seeking judicial review. The Court properly ruled that Koppers had not exhausted its administrative remedies.

The *Algoma* and *Koppers* decisions were cited with approval by the Court in *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957), which was an appeal from the Commission's decision in *Proposed Increased Refrigeration Charges, supra.* In the *Florida Citrus* case, however, the majority of the Court did review the matter on its merits and held that the Commission's order in the case, which it considered a general-increase proceeding, was supported by substantial evidence. That case supports the argument that, even where the Commission does not suspend and/or investigate the subsequently filed tariff, its order authorizing general rate increases is subject to judicial review.

In our view, the *Florida Citrus* decision was correct and the *Algoma* and *Koppers* decisions were wrong. Where the Commission, pursuant to a petition by the railroads, authorizes certain rate increases as just and reasonable, its decision and order, *if made after full hearing,* is reviewable, even if the Commission declines to suspend or investigate the subsequently filed tariff. In the *Florida Citrus* case, the majority of the Court—correctly, we think—reviewed the Commission's decision and order on the merits, and its decision was affirmed by the Supreme Court. The *Algoma* and *Koppers* decisions were not appealed to the Supreme Court.

In this case, the Court need not decide whether it should follow the decisions in *Algoma* and *Koppers* or that in

Florida Citrus, since those cases involved completely different factual situations from that presented here. In this case, the railroads did not petition the Commission to investigate the adequacy of their existing rates and to authorize increases therein. Instead, immediately after receiving Section-6 relief on March 8, 1968, the railroads on March 11, 1968, filed their master tariff proposing the rate increases which were to become effective June 24, 1968. As the railroads correctly state in their memorandum (at pp. 8-9):

> "Following oral argument on June 13-14, 1968, the Commission elected to suspend the effectiveness of the *Ex Parte 259* tariff for the statutory seven-month period allowed under Section 15(7). Its order of June 19, 1968, suspended the tariff until January 23, 1969, and instituted an investigation."

And, as pointed out above, in its final report dated January 9, 1969, the Commission after hearing on the merits found (332 I.C.C. at 789-790):

> "Except where specifically otherwise stated we find the proposed increases just and reasonable."

Thus, unlike the situation before the Courts in the *Algoma, Koppers* and *Florida Citrus* cases, where the Commission had declined to suspend and/or investigate the tariffs, the Commission in this case *did* suspend and investigate the master tariff pursuant to its powers under Section 15(7), and, after full hearing, found the "proposed increases just and reasonable."

While it is firmly established that the Commission's refusal to suspend and/or investigate a new tariff is not

subject to judicial review,* it is equally well established that where, as in this case, the Commission does suspend and institute an investigation under Section 15(7), its decision and order after hearing *are* subject to review by the Courts. In a memorandum to the Supreme Court of the United States filed jointly with the United States last month in *City of Chicago* v. *United States* (No. 1363 and No. 1364, October Term, 1968, re-numbered as Nos. 101 and 102, October Term, 1969), the Commission stated (at p. 7):

> "Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States,* 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed. [footnote omitted] On the other hand, it is well established that after consideration of the merits by the Commission, its final decision not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671." [footnote omitted]

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* A more difficult question is presented where the Commission initially orders suspension and investigation, but shortly thereafter, *without any hearing,* enters an order vacating the suspension. That was the situation in *Carbon Black—Southwest to U.S.A. and Canada,* 298 I.C.C. 721 (1955). The District Court in *Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411 (N.D. Tex. 1956), reversed the Commission, but the Supreme Court remanded with directions to dismiss as moot in *United States* v. *Amarillo-Borger Express, Inc.,* 352 U.S. 1028 (1956). In this case, of course, the Commission's interim and final decisions and orders were made after a *full* investigation and hearing.

In short, the Commission's decisions and orders in this case, made "after consideration of the merits" in an investigation-and-suspension proceeding under the provisions of Section 15(7), are clearly subject to review by this Court.

II.

A Commision decision and order under Section 15(7) is reviewable even though it involves general increases in rates.

In their memorandum, the railroads repeatedly stress that the proceeding before the Commission involved a general increase in virtually all rates. This, however, in no way precludes judicial review of the Commission's decisions and orders. If it did, it would mean that if the Commission in a Section 15(7) proceeding after full hearing and consideration of the merits decides not to set aside an increase in one or a few rates, its order would be subject to judicial review, but that if it decides not to set aside increases in virtually all freight rates, its order would not be reviewable. Merely to state the proposition is to demonstrate its absurdity.

III.

Permissive orders of the Commission, entered after a full hearing, are reviewable by the Courts.

The railroads in their memorandum also rely heavily on the fact that the Commission's orders in this case are merely "permissive" in that the railroads were not required to make effective the rate increases which the Commission found just and reasonable. Some "permissive" decisions of the Commission are admittedly not

reviewable. Where, for example, the Commission, in the exercise of its discretion, decides not to investigate and/or suspend a new tariff or decides not to investigate the proposed discontinuance of interstate passenger trains under the provisions of Section 13(a)(1) (49 U.S.C. §13(a)(1)), its decision to permit the new tariff to become effective or to allow the train to be discontinued is clearly not reviewable.

Where, however, the Commission, pursuant to its powers under Section 15(7), decides to investigate a new tariff, its final order after hearing is clearly reviewable, even though it may be "permissive" in nature. In most proceedings under Section 15(7), the Commission does not, although it could, "prescribe" rates which the railroads must thereafter maintain. Usually, the Commission merely finds the new rates "just and reasonable" or "not shown to be unjust or unreasonable or otherwise unlawful" and permits the carriers to make the rates effective if they so choose. But where the Commission has instituted an investigation under Section 15(7), its final order after hearing is subject to judicial review, regardless of whether the Commission approves or disapproves the proposed rates or prescribes entirely new rates. We know of no case where a Court has ever held that a final order of the Commission after investigation and hearing in a Section 15(7) proceeding is not reviewable, and the defendants have cited no case so holding.

In addition to final orders in Section 15(7) proceedings, the Commission issues many other types of final orders after hearing which are unquestionably reviewable, although "permissive" in nature. For example, in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 328 I.C.C. 304, 330 I.C.C. 328, 331 I.C.C.

643, 331 I.C.C. 754, and 334 I.C.C. 25, the Commission authorized the merger of the Pennsylvania and New York Central railroads. Its order was merely permissive in that the carriers were not required to exercise the authority granted. Before the merger was actually consummated, the Commission's orders in that case were reviewed twice by the District Court for the Southern District of New York in *Erie-Lackawanna Railroad Co.* v. *United States*, 259 F.Supp. 964 (1966), and in *Erie-Lackawanna R.R.* v. *United States*, 279 F.Supp. 316 (1967), and twice by the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967), and *Penn-Central Merger Cases*, 389 U.S. 486 (1968). If, as the railroads contend, permissive orders of the Commission are not reviewable, the Courts have wasted a lot of time on the *Penn-Central Merger* case.

The fact that a Commission order after hearing in an investigation-and-suspension proceeding under Section 15(7) may be "permissive" in nature is clearly no bar to judicial review. It is well-established that such a "permissive" order, as well as many other types of "permissive" final orders of the Commission, are subject to review by the Courts.

IV.

Plaintiffs have exhausted their administrative remedies.

In its memorandum, the Commission contends that plaintiffs have not exhausted their administrative remedies and must first file a formal complaint with the Commission pursuant to Sections 13 and 15. This is clearly not so.

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

There are two ways in which the lawfulness of new rates may be challenged. Where the railroads file a tariff providing for rate increases or other changes, objecting parties can and usually do protest and ask the Commission to suspend and investigate the new rates under the provisions of Section 15(7). In this case the Commission was asked to, and did, suspend and investigate the master tariff providing for increases of from 3 to 10 percent. Where, however, the Commission, in the exercise of its discretion, refuses to suspend and/or investigate and permits the new rates to become effective, their lawfulness can be attacked only by filing a formal complaint under the provisions of Sections 13 and 15.

Theoretically, if the Commission suspends and investigates a new tariff under Section 15(7) and refuses to set aside the new rates, an objecting party may still file a complaint under Section 13. Such action, of course, is usually, if not always, fruitless, since the question before the Commission is the same in both cases. We know of no case where the Commission, after a Section 15(7) investigation-and-suspension proceeding, permitted new rates to become effective, and then immediately turned around and found them unlawful in a Section 13 complaint proceeding. If there are any such instances, they are very few and far between. In this connection, it might be pointed out that after the Commission permitted the rate increases in Ex Parte No. 175 to become effective without suspension or investigation, the Section 13 complaint filed by Koppers was, of course, dismissed by the Commission in *Koppers Co., Inc. v. Chesapeake & O. Ry. Co.*, 301 I.C.C. 284 (1957), 303 I.C.C. 383 (1958), and the Commission's decision was upheld in *Koppers Company, Inc. v. United States*, 166 F.Supp. 96 (W.D. Pa. 1958).

Intervening Plaintiffs' Memorandum in Opposition to Motion to Dismiss

As pointed out above, it is well-established that a Commission order after hearing in a Section 15(7) investigation proceeding is subject to judicial review and many, probably hundreds, of such orders have been reviewed by the Courts.*

Where, as in this case, the final order is by the entire Commission, it is ripe for judicial review without any further proceedings before the Commission, and plaintiffs had every right to bring their action. The intervening plaintiffs, although not required to do so, did seek reconsideration by the Commission. In its final report, the Commission stated that its findings as to justness and reasonableness "will not preclude interested parties from bringing any maladjustments to our attention for correction." (332 I.C.C. at 792) Pursuant to the invitation, intervening plaintiffs filed petitions for reconsideration on January 31, 1969, which the Commission summarily denied by order dated March 26, 1969, "for the reason that sufficient grounds have not been presented to warrant granting the actions sought."

Had the Commission, in its June 19, 1968 order not suspended and instituted an investigation into the lawfulness of the rate increases, at least some of the plaintiffs and intervening plaintiffs would, as suggested by the Commission, probably have filed formal complaints under Section 13 at that time. Such complaints might well have been decided by now. But the Commission *did* suspend and institute an investigation during which, as stated in

* The Commission's annual reports refer to numerous decisions in such investigation-and-suspension proceedings which have been reviewed by the District Courts. See, *e.g.*, 70th Annual Report of the Interstate Commerce Commission, dated November 1, 1956, at pp. 195-197.

the Commission's final report, it was to consider "the lawfulness of the proposed and interim increases as they applied to specific commodities and services" and "the evidence and arguments of all parties with respect thereto." (332 I.C.C. at 714)

Prior to 1910, the Commission had no power to suspend proposed rate changes, and the railroads were free to publish whatever rates they chose, the lawfulness of which could be challenged only by filing a formal complaint. In one of the first and the leading case interpreting the Commission's new power to suspend and investigate rate changes, *Advances in Rates, Western Case*, 20 I.C.C. 307 (1911), the Commission stated (at p. 314):

> "The question before the Commission [in an investigation-and-suspension proceeding] is that which would have arisen had the rates gone into effect and a formal complaint been made against them as unjust and unreasonable. * * * For 'the Commission may make such order in reference to such rate * * * as would be proper in a proceeding instituted after the rate had become effective.'"

In *Ayrshire Corp. v. United States*, 335 U.S. 573, 583 (1949), the Supreme Court referred to *Advances in Rates, Western Case, supra*, as reflecting "the view of the Commission [regarding Section 15(7)] since the beginning" and said "we think it is the correct one." In this case, the Commission modified the railroads' proposal in several respects (322 I.C.C. at 791-792), but found the 6-percent increase in the rates on grain, feed and feed ingredients "reasonable" (p. 754) and authorized the 5-percent increase in the rates on coal (pp. 726-734).

Instead of bringing this action, the plaintiffs could, as suggested by the Commission, begin an entirely new proceeding by filing a formal complaint, in which case they, instead of the railroads, would have the burden of proof. There is, however, no requirement that they do so and, in view of the language in the decisions quoted above, it is extremely doubtful that anything would be accomplished thereby. Moreover, the complaints herein attack the procedure followed by the Commission in *Ex Parte No. 259*, and this issue obviously could not be raised in a new Section 13 complaint. So far as the proceedings before the Commission in *Ex Parte No. 259* are concerned, plaintiffs have exhausted their administrative remedies and are clearly entitled to judicial review of the Commission's decisions and orders.

V.

The Defendants have failed to justify denial of intervening Plaintiffs' right to Judicial Review.

The Commission order under review is, according to the "Commission's Statement of Material Facts Not In Dispute," a "final" report and order. Thus, unlike cases involving the exercise of the Commission's "interim" suspension powers, this Court is now being requested to review the Commission's "completed task." See *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 (1963). The authorities advanced by defendants which establish the nonreviewability of agency decisions to suspend, or not to suspend, a matter consistently held to be committed to agency discretion, and closely analogous to judicial injunctions *pendente lite*, have no bearing on the reviewability of the instant Commission order. The intervening plain-

tiffs do not challenge a suspension decision involving "only a brief and informal hearing," Cf. *Arrow Transportation Co., supra,* 372 U.S. 672, but instead challenge a Commission order following a full investigation and hearing, and a "final" decision specifically finding that both the individual rate increases proposed on grain, and feed ingredients, and the resulting increased rates, are "just and reasonable," and do not exceed "a maximum reasonable level." 332 I.C.C. 754, 792. Defendants' opposition to review of such an order, to the extent based upon the nonreviewability of suspension orders, is clearly misplaced.

VI.

Conclusion.

For the reasons set forth above, the Commission's motion to dismiss should be denied.

Respectfully submitted,

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

REPLY MEMORANDUM OF DEFENDANT INTERSTATE COMMERCE COMMISSION AND OF RAILROAD INTERVENORS IN SUPPORT OF MOTION TO DISMISS

In The

United States District Court

For the Southern District of New York

[Title Omitted in Printing]

Preliminary Statement

The Commission and Railroads hereby reply to the memoranda of plaintiffs and intervenor-plaintiffs in opposition to the motion to dismiss. Because the approach of those groups differs, a separate reply will be made to each.

I.

Reply to Plaintiffs Atlantic City Electric Company, et al.

A. Reply to Argument That the Commission Order Is Invalid. (Plfs. Memo PP. 5-21)

The first defense asserted by the Commission in its answer to the complaint herein is:

> ". . . that the complaint fails to state a claim upon which relief can be granted because the orders of the Commission here under attack are not reviewable . . ."

The plaintiffs and intervenor-plaintiffs by motion urged this court to set procedures for separate determination of that defense which, if held sufficient, "will dispose of the proceeding and eliminate the necessity of considering the

arguments upon the merits." See *Koppers Company* v. *United States*, 132 F. Supp. 159, 160 (W.D. Pa. 1955). The court granted plaintiffs' request for separate ruling on that defense. In its memorandum in support of its motion to dismiss the Commission stated that the issue under its first defense is:

> "Whether individual shippers attacking only two rates may seek judicial review of a Commission order which approved the general level of rates but which did not pass on the reasonableness of the particular rates attacked by plaintiffs." (P. 3)

The intervenor-plaintiffs in their statement of the question recognize that the issue on this motion is simply one of whether or not the Commission's order is subject to judicial review. (Memo P. 2) The railroads in their memorandum in support of the motion to dismiss also treated that as the sole issue in this motion.

However, plaintiffs, which originally asked to have that issue determined prior to any questions of the merits of the case, now state that:

> ". . . The sole issues are: 1. Is the Order approving the changed rates in error, and 2. Is that Order reviewable?" (Memo P. 4)

Logically these questions should be answered in reverse order. Only question 2 is presented for determination now. In support of their argument that the Commission order is in error plaintiffs have made a lengthy argument that it violates constitutional and statutory rights of plaintiffs. That argument, when analyzed, is in reality an argument that the Commission's order is contrary to the evidence or is not supported by the evidence. The Com-

mission and Railroads submit that there was no such deficiency in the record.[1] However, no specific reply will be made to those arguments here as those issues are not before the court on this motion.

B. Reply to Plaintiffs' Argument That the Commission Order Is Reviewable. (Plfs. Memo PP. 22-28)

Plaintiffs quoted 28 USC §1336, which confers jurisdiction on District Courts to enjoin and set aside orders of the Interstate Commerce Commission, and 28 USC §§2321-2325, which deal with the procedure in suits to set aside orders of the Commission. (Memo P. 22) The relevance of those provisions to the issue of whether the Commission order here is reviewable is not explained. In *Algoma Coal & Coke Co.* v. *U. S.*, 11 F.Supp. 487 (E.D. Va 1935), those provisions were held not to permit judicial review of an order similar to that here. Plaintiffs also quote sections of the Administrative Procedure Act. The Commission and Railroads recognize that the A. P. A. applies to reviewable Commission action. However, the sections cited shed no light on the question of whether the order here is reviewable. It should be noted that the *Koppers* and *Florida Citrus Commission* v. *United States*, 144 F.Supp. 517 (N.D. Fla. 1956), affd. *per curiam* 352 U.S. 1021 (1957), upon which the Commission and Railroads rely, were decided after enactment of the A. P. A. in 1946. Moreover, in *Public Utilities Comm. of State of Cal.* v. *United States*, 356 F.2d 236, 239-240 (9th Cir. 1966), cert. den., 358 U.S. 816 (1966), the court held that the A. P. A. definition of reviewable orders was derived from *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370

1. The court could not determine this issue without review of the entire record before the ICC.

(1932), where the Supreme Court drew the distinction between carrier-made rates, as here, and Commission-made rates. The Circuit Court of Appeals also quoted *Algoma* with approval.

Plaintiffs cite four cases in which agency orders were held to be judicially reviewable. However, those orders are not comparable to the order of the Commission here involved. The Commission specifically held that its determination as to rates applies only:

> ". . . to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." (332 ICC at P. 792)

Contrast that with the order held reviewable in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) which was cited by plaintiffs. In that case the order of the FCC was a determination of status. That determination was held reviewable by the company whose status was determined because it "necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed to all carriers amenable to the Commission's authority." (307 U.S. at P. 144)

Similarly, in *Columbia System* v. *United States*, 316 U.S. 407 (1943), regulations of the FCC entered after a rule-making investigation were held to be reviewable. There the regulations governed the contractual relations between

radio stations and networks. The Supreme Court noted that compliance by radio stations with the mandatory regulations had caused injury to the networks and held:

> "Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of §402(a) and the Urgent Deficiencies Act . . ." 316 U.S. at P. 418-419)

Frozen Food Exp. v. *United States*, 351 U.S. 40 (1956), also cited by plaintiffs, involved an order that specifically determined that the transportation of certain commodities by motor carriers was not exempt from Commission regulations under the provision of 49 U.S.C. §203(b)(6). In holding that order to be reviewable the Supreme Court said:

> ". . . Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. A carrier authorized to carry specified commodities and dependent on exempt articles for its return load may lose its right to operate at all, if it does not respect the Commission's 'order.' Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'order' of the Commission is in substance a 'declaratory' one, see 60 Stat. 240, 5 U.S.C. §1004(d), which touches vital interests of carriers and shippers alike and sets the standard

for shaping the manner in which an important segment of the trucking business will be done. Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407. The consequences we have summarized are not conjectural. The Commission itself places this interpretation on its action and argues, contrary to its position in the *Los Angeles Case, supra*, for finality of the order . . ." (351 U.S. at P. 44-45)

The last case cited by plaintiffs on this point is *Gonzalez* v. *Freeman*, 334 F.2d 570 (C.A. D.C. 1964), *cert. den.* 381 U.S. 904 (1965). In that case a final order of the Secretary of Agriculture prohibited plaintiff from participating in contracts with Commodity Credit Corporation. There was no provision for further proceeding before the Department of Agriculture. The court held that the action of the Secretary of Agriculture was subject to judicial review.

These cases have been discussed at some length only to demonstrate that they do not involve agency orders or action of the type plaintiffs seek to set aside here.

None of those cases involve the administrative problem in revenue cases such as this. See *United States* v. *Louisiana*, 290 U.S. 70, 77[2] (1933), where the Supreme Court said:

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2. Plaintiffs claim that the *Louisiana* case does not support the Commission's procedures in its *Ex Parte* 259 case because the substantive standard of lawfulness in Section 15(a)(2) is changed from the standard that applied in the case before the court in Louisiana. In *Florida* v. *United States*, 292 US 1, 7-8 (1934), the Supreme Court noted that change and that the amendment emphasized the carriers' need for adequate revenues. The importance of the *Louisiana* case is the approval of the procedures followed by the ICC in general revenue cases, including the fact that the Commission does not make a final determination as to specific rates. The administrative problems are the same now as then, and the burden of proof is unchanged. See *The Interstate Commerce Commission*, Vol. 1, P. 58, by I.L. Sharfman, Commonwealth Fund, 1931.

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". . . in performing the duty broadly to increase carrier revenue, it is enough if the Commission in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of investigation cannot be marked by this court with certainty."

See also *New England Divisions Case*, 261 U.S. 184, 197-198 (1923), where the court said:

"For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, §12, 36 Stat. 539, 551, 552, to be upon the carrier.[18] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new §15a. It was the actual necessities of procedure and administration which had led to the adoption of that method; in passing upon the reasonableness of proposed rate increases . . ." (261 U.S. at pp. 197-198) [footnotes omitted]

Bringing themselves at last to a discussion of *Algoma, Koppers* and *Florida Citrus,* plaintiffs argue that those cases "are not relevant here because they challenge the *rates* put into effect, not the *constitutionality* of the Commission's methods of arriving at its order." (Memo P. 26)

Apparently plaintiffs recognize that those cases bar review of the Commission's order insofar as it permits the filing of tariffs publishing increases in the individual rates in which plaintiffs are interested. Plaintiffs are interested solely in rates on coal to their electric generating stations. They do not dispute the fact that the railroads are, as found by the Commission, in urgent need of increased revenue. The raising of a "constitutional" procedural issue in respect to the Commission's order is sufficient to avoid the clear thrust of the *Algoma, Koppers* and *Florida Citrus* cases. Contrary to plaintiffs' argument, the *Algoma* case was not limited solely to a challenge to the "rates put into effect." There the court in summarizing the contentions of the coal shippers who sought to avoid the increases on coal rates said:

> "The plaintiffs' contention, as to the alleged invalidity of the order, is in substance that the conclusion of the Commission that the increased rates 'will not be in excess of just and reasonable rates for a period to terminate June 30, 1936' is not itself a finding of fact (but merely a conclusion) and is based only on the finding of fact as to the financial needs of the carriers which is not legally sufficient to justify the conclusion, and therefore the action of the Commission in entering the orders was arbitrary and without warrant in law . . ." (11 F.Supp. at P. 492)

Note that the allegations in *Algoma* broadly attacked the legal sufficiency of the Commission order in its entirety, and there, as here, the complaint was one to enjoin and set aside the Commission order in its entirety. Of course, there, as here, the plaintiffs' real interest was in specific rates on coal. Plaintiffs have not distinguished this case from *Algoma*, *Koppers* and *Florida Citrus*.

Moreover, even if *Algoma* had involved only a challenge to specific "rates put into effect," the rationale of the *Algoma* case would apply here. To the extent the order permits increased rates in which plaintiffs have no interest, they are not affected thereby. The Commission did not adjudicate upon the specific coal rates used by the plaintiffs (or upon specific rates used by anyone else) and, to the extent that those coal rates might exceed a maximum just and reasonable level because of the increase or for any other reason, the plaintiffs have a remedy under Sections 13 and 15 of the Act, an administrative remedy which they have not exhausted. And, as was true in *Algoma*, these plaintiffs cannot "show an invasion . . . of some independent legal right whereby they particularly are subject to injury." (11 F.Supp. at P. 496)

In their discussion of whether or not the Commission order is reviewable plaintiffs discuss the permissive nature of the Commission orders (Memo PP. 26-27) and exhaustion of administrative remedies (Memo P. 28). Those points are more fully developed by the intervening plaintiffs and are answered *infra* in reply thereto.

II.

Reply to Arguments of Intervenor-Plaintiffs.

A. Preliminary Analysis.

The intervenor-plaintiffs recognize that the sole issue on the motion before the court is whether or not the Commission order is reviewable. Aside from making what has been characterized as a "distinction without difference," their response to the *Algoma, Koppers* and *Florida Citrus* cases, the principal cases relied on by the Commission and railroads here, is to state the *Algoma* and *Koppers* are wrong and that *Florida Citrus,* in which the court characterized the *Algoma* and *Koppers* cases as stating the "law of the land," is correct. (Memo P. 7) Because intervening plaintiffs concede that the *Florida Citrus* decision is correct, the court's attention is directed to what was said there in dismissing a complaint against a Commission order permitting nationwide increases in refrigeration charges. There the court said:

> "As in the *Algoma* case, the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided." (144 F.Supp. at p. 523)
>
> "On the theory that we have under review a rate case rather than a revenue case, the plaintiffs assert they will have no opportunity for redress from the discriminatory effects of the increases in the charges as applied to specific situations unless we set aside the Commission's order. But, it appears, the plaintiffs in this case as in *Algoma Coal & Coke Co. v. United States, supra,* and in *Koppers Company* v. *United States,* D.C.W.D. Pa. 1955, 132 F.Supp. 159,

161, have mistaken their remedy." (144 F.Supp. at PP. 525-526)

"It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348. Cf. *Atlantic Coast Line Railroad Co.* v. *State of Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L. Ed. 1451. But this rule has no application under the permissive provisions of an order in a general revenue case such as is this case. Supported by substantial authority it was held in the *Algoma* case [11 F.Supp. 496] 'If the increased rates, as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13 and 15 of the act (49 U.S.C.A. §§13, 15) for individual relief, and for reparation orders under section 16(1) of the act (49 U.S.C.A. §16(1)). [Citing cases.] Nothing in the Commission case debars them from such relief.' This, we think, as expressed by the Secretary of Agriculture, is the law of the land, and it is applicable to the instant case." (144 F.Supp. at P. 527)

Intervening plaintiffs' characterization of *Algoma* as "wrong" is contrary to the 1966 opinion of the Court of Appeals in *Public Utilities Comm. of State of Cal.* v. *United States, supra.*

B. The Procedural Distinction Made by Intervening Plaintiffs Is without Significance.

Intervening plaintiffs suggest that the procedures before the Commission which resulted in the orders which were held non-reviewable in *Algoma, Koppers* and *Florida Citrus* were different from the procedures followed in the *Ex. Parte 259* case, which resulted in the Commission's orders involved here. The procedural difference is solely that the Commission determinations in *Ex. Parte 259* were made in an investigation entered into after suspension of the railroad-initiated rates, while the order in the *Ex. Parte 145* proceedings which were before the court in *Algoma* was made after an investigation conducted on a petition in respect to the railroad-initiated rates. It is not a distinction of substance which should cause a different legal result to obtain. The findings made by the Commission in the case that was before the court in *Algoma* are similar to the finding made by the Commission here, the lawfulness of individual rates was not determined there or here, and the availability of remedies under Sections 13 and 15 were the same there as here. In fact, in *Algoma* the court saw no substantive difference between the petition procedure there and the investigation procedure followed here. The court said:

> ". . . It is true that ordinarily rate changes are initiated by the carrier by the filing of new tariffs with the Commission before a hearing. But this order of procedure is not definitely required by the act, and there would seem to be no reasonable objection to the procedure actually adopted here in view of the quite imperative emergency situation confronting the railroads." (11 F.Supp. at p. 493)

C. The Intervening Plaintiffs Misconstrue the Commission's Order.

The intervening plaintiffs at Memo P. 8 and P. 17 construe the Commission's order as having finally determined the lawfulness of the individual rates with which they are concerned. However, the Commission, as has been its custom in general revenue cases for more than thirty years, did not determine specific lawfulness of rates, but rather made its findings in respect to general bases of rates and charges. This is made clear from the Commission's finding No. 15 in the assailed order, which is quoted *supra* at Page 5. There the Commission specifically held that the rates and charges authorized were not prescribed and that they were subject to complaint and investigation. Intervening plaintiffs quote the Commission statement that:

> ". . . Except where specifically otherwise stated, we find the proposed increases just and reasonable." (332 ICC at P. 789-790)

Ignoring finding No. 15 in the report, they argue that there is a determination which prevents application of the opinions in *Algoma, Koppers* and *Florida Citrus*. However, that language is similar to that employed by the Commission in the orders under review in those cases, viz.:

Algoma

> ". . . we find that the present rates and charges, as increased by the emergency charges here authorized will not be in excess of just and reasonable rates . . ." (*Ex Parte 115, Emergency Freight Charges, 1935*, 208 ICC 4, at P. 60)

Koppers

". . . we conclude that we should now authorize further increases in rates and charges beyond those previously authorized . . . all basic freight rates and charges of petitioning railroads . . . may be justly and reasonably increased 15 percent." *(Ex Parte 175, Increased Freight Rates, 1951,* 284 ICC 575, at PP. 660, 661)

Florida Citrus

"We further conclude that . . . the basic refrigeration charges may be increased as herein specified and that the charges so increased will be just and reasonable for the future." *(Proposed Increased Refrigeration Charges,* 297 ICC 505, at P. 554)

The intervening plaintiffs have fallen into the same error here as did plaintiffs in the *Algoma* case. There the court, referring to similar argument, said:

"The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact . . ." (11 F. Supp. at P. 493)

The above statement was quoted with approval in *Public Utilities Comm. of State of Cal.* v. *United States, supra,* at P. 239-240, where the court held that an FPC opinion and order which dealt with telephone company tariffs was not reviewable.

This misconception of the Commission's order is then relied upon by intervening plaintiffs in making arguments in respect to exhaustion of administrative remedies and in respect to the reviewability of orders under Section 15(7) of the Act.

D. The Commission and Railroads Have Not Contended that All Commission Orders Entered after Investigations under the Provisions of Section 15(7) Are Non-Reviewable.

The intervening plaintiffs argue that all Commission orders entered in proceedings under Section 15(7) are subject to jurisdictional review, and in support of that proposition quote from a memorandum to the U. S. Supreme Court filed by the Interstate Commerce Commission. (Memo. P. 9) The Commission and railroads have not in this case contended that all orders are non-reviewable. However, for rate orders under Section 15(7) to be reviewable those orders must make a specific final determination of the reasonableness of the specific rates involved and in which plaintiffs have a direct interest. Here there has been no determination by the Commission of the lawfulness or reasonableness of any individual rate. There has merely been a determination in respect to general bases of rates and charges in a general revenue proceeding with the specific statement that the rates are not prescribed and that their lawfulness is open for review and proceedings brought under Sections 13 or 15 of the Interstate Commerce Act.

In *United States* v. *Louisiana, supra,* the Supreme Court specifically approved the Commission's practice of making only general determinations as to broad groups of rates in dealing with general revenue cases and, of course, it is the fact that the Commission must deal generally with the

rate structure in a revenue case that precludes a need for specific findings as to the lawfulness or reasonableness of individual rates. This is one of the distinctions which makes the order in this case not subject to review, while orders in other rate cases conducted under Section 15(7) may be reviewable.

E. It is Not Contended That All Permissive Orders Are Non-Reviewable.

The Commission and Railroads have not contended that the permissive character of the order in and of itself makes the Commission order non-reviewable. Intervening plaintiffs argue that permissive orders of the Commission entered after full hearing are reviewable, but they also concede that "some 'permissive' decisions of the Commission are admittedly non-reviewable." (Memo P. 10) The railroads do not contend that such permissive orders as those which authorized the merger of two or more railroads are not subject to judicial review. Those orders represent essential prior Commission action and not, as here, merely the decision of the Commission not to interfere with carrier action, which interested shippers and receivers of freight may call into question in a proceeding under Sections 13 and 15. In the present case the essential significance of "permissiveness" is indicated by the following quotation from *Algoma* (11 F.Supp. at P. 493):

> "The result of the Commission proceedings, therefore, was merely to permit the railroads to initiate new rates."

At page 494:

> "[The Commission] *prescribed* no particular rates. It merely permitted the carriers to file new

> rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13. (49 USCA §13) That is to say, the increased rates now complained of are *carrier-made* rates and not *Commission* made rates." (emphasis by the Court)

The order here under review, therefore, is essentially different from those cited by the intervening plaintiffs as being permissive orders. This order, which made no determination as to any specific rate and which provided for subsequent consideration of the carrier-made rates in which intervening plaintiffs are interested, is non-reviewable.

F. The Plaintiffs Have Not Availed Themselves of the Procedures for Determination of the Lawfulness of the Rates in Which They Are Interested.

Plaintiffs and intervening plaintiffs argue that they are without remedies other than here. Plaintiffs have not exhausted their administrative remedies. They have ample remedies against any rate unlawfulness in which they have an interest. As stated in the Commission order, they can have a full and complete determination of the lawfulness of those rates. In such proceedings, the Commission can fix their rates for the future and, pursuant to Section 8 of the Act, can award damages in connection with past shipments.

That procedure was approved as a reasonable solution to the administrative problem in *United States* v. *Louisiana*, and *New England Divisions Case, supra.* If that procedure were not followed, inequitable and possibly

drastic injury to the adequacy of the nation's transportation system could result. For example, a shipper interested only in a few specific rates would be able to deny the railroads millions. Here the increased rates will produce approximately $466 million annually (332 ICC at P. 602) and these amounts were found by the Commission to be necessary to meet the railroads' critical need for increased revenue to offset in part increased operating costs (332 ICC at P. 790). These practical considerations led the court in *Koppers* to state that:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement." (132 F. Supp. at p. 163)

Intervening plaintiffs' objection to proceeding under Sections 13 and 15 is no reason for modifying the court-approved procedures Congress provided in those sections. Their speculation that such proceedings would be "fruitless" (Memo p. 13) or as plaintiffs suggest "hollow" (Memo p. 25) is unfair. There are numerous cases in which the Commission in Section 13 proceedings has granted relief in respect to specific rates—both as to the future and as to damages in the past—after such rates had been increased subsequent to a general revenue proceeding. See, e.g., *State Corp. Comm. of Va.* v. *Norfolk & W. Ry. Co.*, 190 I.C.C. 325, 344-345 (1932); *William Kelly Milling Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I.C.C. 53, 56 (1935); and *Marshall Field & Co.* v. *Chesapeake & O. Ry. Co.*, 244 I.C.C. 789, 792 (1940).

Conclusion

The motion should be granted and the complaint dismissed.

Respectfully submitted,

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ORDER OF THE COURT

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

October 28, 1969

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *v.* UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION ET AL.,	Three-judge Court No. 69 Civ. 800

McLEAN, District Judge.

Seven public utilities operating in the northeastern section of the United States brought this action to enjoin and set aside an order of the Interstate Commerce Commission made on January 9, 1969, in a proceeding entitled "Ex Parte 259, Increased Freight Rates, 1968." The order permitted the Class I railroads of the United States to put into effect a rate increase on a great number of commodities. Among the rate inreases so authorized was an increase of 5 per cent on bituminous steam coal, up to a maximum of 15¢ per ton. Plaintiffs are large users of bituminous steam coal and hence are adversely affected by the order. They claim that the order is unlawful and that the procedures employed by the Commission have deprived them of due process of law.

The State of New York and the Departments of Agriculture of ten other northeastern states have been permitted to intervene as parties plaintiff. They complain of the increase of 6 per cent authorized by the order in freight rates on grain, feed and feed ingredients moving into the northeastern states.

Many Class I railroads have also been permitted to intervene. They support the Commission's order.

The Commission has moved under Rule 12(b) (6) to dismiss the action on the ground that plaintiffs and intervenor plaintiffs have failed to state a claim upon which relief can be granted. In essence, the Commission asserts that the attack upon its order is premature. Decision of this question requires analysis of the Commission's order and consideration of the remedies available to plaintiffs and intervenor plaintiffs under the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.*

The various steps in the proceeding before the Commission which resulted in the order under attack are set forth in two reports of the Commission, an interim report dated November 25, 1968 (332 I.C.C. 590), and a final report dated January 9, 1969 (332 I.C.C. 714). They may be briefly summarized as follows.

On March 7, 1968, the Class I railroads filed with the Commission a petition for permission to publish increased freight rates. The Commission granted their request. On March 11, 1968, the railroads filed their master tariff X-259 containing schedules of proposed increases, to be effective on May 27, 1968. The effective date was later postponed to June 24, 1968. The proposed increases ranged generally from 3 to 10 per cent, depending upon the commodity involved. By order entered June 19, 1968, the Commission suspended until January 24, 1969 all increases in excess of 3 per cent. This order also directed that an investigation be made of the proposed increases.

The investigation was divided into a number of parts, designated as "subnumbers." "Sub-No. 2" was concerned with "railroad cost and revenue need." Other sub-numbers pertained to the increases requested on particular commodities. Sub-No. 3 was concerned with coal; Sub-No. 5 with grain. Hearings were held before hearing examiners.

Plaintiffs and intervenor plaintiffs appeared and protested the proposed increases.

The Commission's interim report dated November 25, 1968 was devoted to the need of the railroads for increased revenue, *i.e.*, Sub-No. 2 of the proceeding. The Commission concluded that "the proposed rate level, generally speaking, is within the zone of reasonableness." 332 I.C.C. at 608. The Commission went on to find that "the increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates of and charges." 332 I.C.C. 609.

It further found:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U.S. 370 [52 S. Ct. 183, 76 L. Ed. 348], and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 609.

By order dated November 25, 1968, the Commission vacated its suspension order of June 19, 1968 and permitted the full increases proposed by the railroads to take effect, except as to certain commodities, one of which was grain. As to these, the suspension order was continued.

At the beginning of its final report dated January 9, 1969, the Commission referred to its interim report of November 25, 1968, and stated that the proceeding had been continued thereafter "for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto." 332 I.C.C. 714. The Commission then remarked:

> "Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount, nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed." 332 I.C.C. 715.

The Commission went on to say:

> "We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U.S. 370 [52 S. Ct. 183, 76 L. Ed. 348]." 332 I.C.C. 715.

The report then discussed at length the contentions of the parties with respect to proposed increases for various commodities or groups of commodities. With respect to a few of them, not including coal or grain or feed moving to the northeast, the Commission denied the full increases requested by the railroads. As to the others, the railroads' request was approved. As far as material here, the Com-

mission's ultimate conclusions and findings were: (1) there is a critical need on the part of the railroads for additional revenue to offset, in part, increased operating costs; (2) the basic freight rates may be increased generally in accordance with master tariff X-259; (3) the increased freight rates will not exceed "a maximum reasonable level"; (4) "Our findings as to justness and reasonableness . . . will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction." 332 I.C.C. 792.

The Commission's order dated January 9, 1969, based upon this report, provided, in a somewhat backhanded fashion, that the railroads were directed to cease and desist from collecting basic rates "increased to a greater extent than found just and reasonable herein . . ." 332 I.C.C. 793.

It is apparent from this recital that the proceeding before the Commission was a general revenue proceeding. The Commission was concerned primarily with the "need, in the public interest, of adequate and efficient railway transportation service" and with the railroads' "need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. §15a(2). The increases in rates were general, even though the percentage of increase varied from commodity to commodity. The new rates were "carrier-made," that is to say, the Commission merely authorized the railroads to put the increases into effect, it did not require or prescribe them. It is true that the Commission found these general increases, on an overall basis, to be just and reasonable. But the Commission did not purport to pass upon individual rates as contrasted

with the general level. It neither prescribed nor specifically authorized a particular rate on a particular commodity, say coal or grain, from a specific point of origin to a specific destination.

[1] If plaintiffs wish to complain of the reasonableness of a particular rate on the coal that is transported to them from a particular point of origin, they have the right to apply to the Commission under 49 U.S.C. §§13 and 15 to prescribe a different rate. The intervenor plaintiffs have the same right as to the rates on grain and feed with which they are concerned. This is what the Commission referred to in stating that its findings would not preclude interested parties from bringing any maladjustments to the Commission's attention. Neither plaintiffs nor intervenor plaintiffs have instituted such a proceeding. The nub of the present controversy is whether or not they must do so before seeking review of the Commission's general revenue increase order.

The Commission argues that plaintiffs and intervenor plaintiffs are attacking the rates on coal and grain respectively, and that this court should not hear them at this time. The Commission contends that the two sets of plaintiffs must first exhaust their remedies under Section 13. If they do, it may turn out that the Commission will heed their protests and will adjust the rates which directly affect them. In that event, their complaint will be satisfied and there will be no need to consider the propriety of the general increase order. Plaintiffs and intervenor plaintiffs, on the contrary, say that in this action they are not attacking the rates on coal and grain as such. They say that they are complaining of the entire order, on the ground, to put it simply, that the Commission acted illegally in making it. They contend that this court should hear them now, without

putting them to the trouble and expense of making an application to the Commission under Section 13, an application which may prove to be futile.

It is true that on the face of the complaint, plaintiffs do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal. Although the complaint does not allege that the Commission erred in finding that the railroads need increased revenues, it does assert that the Commission acted "without evidence in the record as to the justness and reasonableness of such rates." It alleges a number of respects in which the Commission acted improperly, *i.e.*, in not making its Bureau of Accounts a party to the proceeding, in failing to order its examiners to make preliminary decisions, in failing to afford plaintiffs an opportunity to propose findings and conclusions, in failing to require the railroads to submit evidence of cost, in making findings on the basis of unsupported opinion, et cetera.

The intervenors' complaint alleges that the Commission "erred" and "acted arbitrarily, capriciously and abused its discretion" in a variety of ways. For example, the complaint asserts that the Commission rejected evidence that traffic subjected to higher percentage increases was presently bearing a disproportionate contribution to rail revenues, that the Commission refused to consider plaintiffs' cost study, that its findings in various respects were contradicted by the evidence, that it refused to give any weight to economic conditions and trends in northeastern agriculture, et cetera.

The Commisssion's motion to dismiss is based upon the face of the complaints. It necessarily admits for the purposes of this motion the truth of their allegations, in so far

as those allegations are statements of fact rather than legal conclusions. Thus, although the Commission does not admit that it erred or that it acted illegally, arbitrarily or capriciously, it does admit that it did not take the procedural steps which plaintiffs say it should have taken, that it rejected proferred evidence which plaintiffs deemed relevant, and the like. Nevertheless, the question remains whether this court at this time should undertake to pass upon these matters and decide the merits of plaintiffs' claims.

[2] It is clear that the general revenue order which the Commission made here was within its powers under 49 U.S.C. § 15a(2), in view of the impracticability of dealing with specific rates in a proceeding in which hundreds of commodities were involved. United States *v.* Louisiana, 290 U.S. 70, 54 S. Ct. 28, 78 L. Ed. 181 (1933); King *v.* United States, 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301 (1952).

As to the reviewability of the order, the Commission and the intervenor railroads rely primarily upon three decisions: Algoma Coal & Coke Co. *v.* United States, 11 F. Supp. 487 (E.D. Va. 1935); Koppers Co. *v.* United States, 132 F.Supp. 159 (W.D. Pa. 1955); Florida Citrus Commission *v.* United States, 144 F.Supp. 517 (N.D. Fla. 1956), aff'd, 352 U.S. 1021, 77 S. Ct. 589, 1 L. Ed. 2d 595 (1957). *See also,* Birmingham Slag Co. *v.* United States, 11 F. Supp. 486 (N.D. Ala. 1935).

These cases support the Commission's position here. They held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when plaintiffs have not exhausted the remedy afforded them by Section 13 to seek an adjustment of the particular rates which affect them. The dis-

tinctions which the present plaintiffs attempt to draw between those cases and this one do not seem to us to be substantial or significant. The fundamental principle is the same. As the court said in *Koppers*:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F.Supp. at 163.

It may be that in some of the cases cited plaintiffs aimed their attack more directly at the rates authorized by the general revenue order than do the present plaintiffs and intervenors. But the fact remains that in this case as in the others plaintiffs' real concern is with the increased rates which the order authorized on the commodities in which they are interested. If the Commission had not approved a general increase on coal and grain and feed, plaintiffs and intervenors would not be here complaining of the procedures followed by the Commission.

[3] And it is as true in this case as in the others that by pursuing their remedy in a Section 13 proceeding, plaintiffs and intervenors may achieve the relief that they are really seeking, *i.e.*, a reduction in the particular rates on coal and

grain and feed. This court cannot assume that the Commission will deny them relief nor can it relieve them from the necessity of seeking it because to do so may be time-consuming and expensive. In our opinion, this is what the statutory scheme requires. Until this step has been taken, plaintiffs have not suffered any real injury. Only if and when their application under Section 13 is rejected will the Commission's action be ripe for judicial review.

We have carefully considered plaintiffs' argument that it is unjust to deny them a review of the Commission's general revenue order at this time because this is their only opportunity to have it reviewed. They maintain that in a subsequent Section 13 specific rate proceeding, the Commission will not consider their objections to the procedures followed in the prior general revenue proceeding and hence that they will be forever foreclosed from obtaining a judicial determination of the merits of the claims which they now assert. By way of justification of their fears, they cite Koppers Co. *v.* Chesapeake & Ohio Ry., 303 I.C.C. 383 (1958), a proceeding before the Commission subsequent to the court's refusal to review the Commission's general revenue order in Koppers Co. *v.* United States, 132 F.Supp. 159 (W.D. Pa. 1955), previously discussed. In the course of its opinion, the Commission said, with reference to the prior general revenue order:

> "Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." 303 I.C.C. 387.

Order of the Court

[4] We do not attempt, of course, to pass upon the propriety of this ruling of the Commission in the *Koppers* case. It is enough to say that in the case before us, we believe that plaintiffs' fears, however natural they may be under the circumstances, are unfounded. The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs. We see no reason why, upon making a proper record before the Commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its review of the Commission's final order in the Section 13 proceeding. Although independent research by the court on this subject has revealed no decision directly in point, it is our view that an analogy may be found in cases involving the review of the Commission's order under Section 13(4) with regard to intrastate rates in which criticisms of a prior general order involving interstate rates were considered by the court. *See e.g.*, Illinois Commerce Commission *v.* United States, 292 U.S. 474, 54 S. Ct. 783, 78 L. Ed. 1371 (1934); North Carolina *v.* United States, 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945); Tennessee *v.* United States, 113 F.Supp. 634 (M.D. Tenn. 1953), aff'd, 346 U.S. 891, 74 S. Ct. 222, 98 L. Ed. 394 (1953). In any event, we are satisfied, for the reasons previously mentioned, that the statute does not contemplate an attack upon the general revenue order at this stage.

Order of the Court

The Commission's motion is granted. The action is dismissed for failure to state a claim.

So ordered.

Dated: October 28, 1969

s/ IRVING R. KAUFMAN

U.S.C.J.

s/ DUDLEY B. BONSAL

U.S.D.J.

s/ EDWARD C. MCLEAN

U.S.D.J.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that Atlantic City Electric Corporation, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company and Rochester Gas and Electric Corporation, four of the above named plaintiffs, the State of New York and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts, ten of the above named intervening plaintiffs, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on October 28, 1969.

This appeal is taken pursuant to 28 U.S.C. 1253.

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Notice of Appeal to the
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Dated: December 18, 1969

ORDER NOTING PROBABLE JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1083, October Term, 1969

ATLANTIC CITY ELECTRIC COMPANY, et al.,

Appellants,

v.

UNITED STATES, et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 1283 and a total of one and one half hours is allotted for oral argument.

May 18, 1970

Mr. Justice Douglas took no part in the consideration or decision of this order.

[*The next page is 169a*]

Part B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX TO VOL. I — PART B

ITEM NO.*		PAGE
—	Chronological List of Relevant Docket Entries	171a
16.	Amended and Supplemental Complaint (omitting Exhibits 1 and 2 which duplicate Items 52(I-27) and 52(I-30) in Part C of the Consolidated Appendix)	173a
17.	Answer of intervening defendants Aberdeen and Rockfish Railroads, et al., to the Amended and Supplemental Complaint	186a
21. (Partial)	Amended and Supplemental Complaint of Intervening Plaintiff, the Secretary of Agriculture	192a
22.	Answer of ICC to Amended and Supplemental Complaint	204a
25.	Answer of the United States to the Amended and Supplemental Complaint and intervening complaint	207a
27.	Answer of the Aberdeen and Rockfish Railroad Company, et al. to the Amended and Supplemental Complaint of the Secretary of Agriculture	208a
28.	Answer of the ICC to the Amended and Supplemental Complaint of the Secretary of Agriculture	211a
57.	Opinion of the District Court (with dissenting opinion, Wright, J.)	213a
59.	Judgment of the District Court	220a
60.	Notice of Appeal	221a
—	Order Noting Probable Jurisdiction	223a

* References are to Item Nos. in Docket No. 1283.

Chronological List of Relevant Docket Entries

November 27, 1968—Complaint filed

February 3, 1969—Order permitting Secretary of Agriculture to intervene as Party Plaintiff

February 12, 1969—Amended and Supplemental Complaint Filed

March 10, 1969—Order permitting Aberdeen and Rockfish R.R. et al. to intervene as defendants

March 24, 1969—Amended and Supplemental Complaint of Secretary of Agriculture.

March 24, 1969—Answer of ICC to Amended and Supplemental Complaint

March 25, 1969—Answer of United States to Amended and Supplemental Complaint and Intervening Complaint

April 7, 1969—Answer of Aberdeen and Rockfish R.R. et al. to Amended and Supplemental Complaint of Secretary of Agriculture

April 7, 1969—Answer of ICC to Amended and Supplemental Complaint of Secretary of Agriculture

August 18, 1969—Motion of Plaintiffs for Determination that Action be maintained as a class action

September 16, 1969—Memorandum of Defendant ICC and Intervening Defendants in Opposition to such Motion

November 10, 1969—Hearing before three-judge court

December 4, 1969—Memorandum Opinion of District Court (with dissenting opinion, Wright, J.)

December 19, 1969—Judgment

February 4, 1970—Notice of Appeal

[*The next page is 173a*]

Amended and Supplemental Complaint Seeking Review of Interstate Commerce Commission Orders

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 2970-68

ALABAMA POWER COMPANY, AMERICAN PAPER INSTITUTE, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC., GEORGIA POWER COMPANY, GULF POWER COMPANY, MANUFACTURING CHEMISTS' ASSOCIATION, INC., PROPERTY OWNERS' COMMITTEE, SOUTHERN ELECTRIC GENERATING COMPANY, SOUTHERN PAPER MANUFACTURERS TRAFFIC CONFERENCE, STEEL SHIPPING CONTAINER INSTITUTE,

individually and as representatives of shippers as a class,

Plaintiffs,

[Addresses omitted in printing]

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants.

I

This is an action to enjoin, annul and set aside orders of the Interstate Commerce Commission (herein called "Commission") dated November 25, 1968, 332 I.C.C. 590 and January 9, 1969, 332 I.C.C. 714, in a proceeding entitled *Ex Parte No. 259, Increased Freight Rates 1968*, true, correct and complete copies of which, together with

the accompanying reports, are attached hereto as Exhibits 1 and 2 respectively.

II

The jurisdiction of the Court is founded upon Sections 1336, 1398, 2284 and 2321-2325 of Title 28 of the United States Code Sections 701-706 of Title 5 of the United States Code and Rule 23, Federal Rules of Civil Procedure. The residence of the plaintiff Property Owners' Committee and the principal office of the plaintiff Manufacturing Chemists' Association, Inc., are in the District of Columbia.

III

The plaintiffs are as follows:

1. Alabama Power Company is a corporation organized and existing under the laws of the State of Alabama. It provides electric utility service throughout 56 of the 67 counties of the State of Alabama.

2. American Paper Institute is a corporation organized and existing under the laws of the State of Delaware. It is the national trade association of the pulp, paper and paperboard industry. Its membership of approximately 250 companies, representing in excess of 85 percent of the industry, operates 5,713 plants located in 48 states, engaged in the manufacture of pulp, paper, paperboard and paper products.

3. Association of Home Appliance Manufacturers is an unincorporated non-profit trade association of nearly all companies manufacturing home appliances in the United States. Its member companies manufacture and ship over 90 percent of the major home appliances in the United States, including room air conditioners, dehumidifiers,

dishwashers, disposers, home laundry appliances, portable appliances, ranges, refrigerators and freezers.

4. Gas Appliance Manufacturers Association, Inc. is a corporation organized and existing under the laws of the State of Illinois. It is a non-profit trade association of 650 manufacturing firms which produce 95 percent of all the residential, commercial and industrial gas appliances and equipment made in the United States, as well as equipment used in the production, transmission and distribution of natural gas.

5. Georgia Power Company is a corporation organized and existing under the laws of the State of Georgia. It provides electric utility service throughout 153 of the 159 counties of the State of Georgia.

6. Gulf Power Company is a corporation organized and existing under the laws of the State of Maine. It provides electric utility service to the Western Panhandle of Florida.

7. Manufacturing Chemists' Association, Inc. is a corporation organized and existing under the laws of the State of New York. It is a non-profit trade association of 186 United States and 14 Canadian company members representing more than 90 percent of the productive capacity of the basic industrial chemicals within these countries.

8. Property Owners' Committee is an unincorporated voluntary association of coal mine operators and land owners with properties located in southern West Virginia, Virginia and eastern Kentucky.

9. Southern Electric Generating Company is a corporation organized and existing under the laws of the State

of Alabama. It operates a steam electric generating station which supplies power to Alabama Power Company and Georgia Power Company.

10. Southern Paper Manufacturers Traffic Conference is an unincorporated association of 42 pulp and paper producers charged with responsibility for representing its members in traffic and transportation matters of general industry interest. The member companies of the Conference receive and ship a variety of commodities, notably pulpwood and wood chips and paper and paper products, in railroad service, to and from 79 plants located in the Southeast and Southwest.

11. Steel Shipping Container Institute is a corporation organized and existing under the laws of the State of New York. It is a trade association representing 32 companies producing steel drums and other shipping containers. Those 32 companies produce about 90 percent of the iron and steel shipping containers manufactured in the United States.

12. The principal offices of the foregoing plaintiffs are as listed in the caption.

IV

In addition to suing individually in their own behalf plaintiffs also sue in behalf of all shippers similarly situated. The class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of plaintiffs are typical of the claims of the class and plaintiffs will fairly and adequately protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent or varying

adjudications with respect to individual members which would establish incompatible standards for the parties opposing the class and (b) adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication. Moreover, the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

V

The United States of America is named as party defendant pursuant to the provision of Section 2322 of Title 28 of the United States Code. The Commission is named as a defendant because of its interest in defending its orders.

VI

On March 11, 1968 the railroads of the United States filed a tariff entitled "Tariff of Increased Rates and Charges X-259". By order entered June 19, 1968 the increases in rates and charges were suspended to the extent that they exceeded 3 percent and an investigation was ordered. By order of July 3, 1968 the Commission divided the investigation into 10 sub-proceedings—Sub-No. 2, railroad cost and revenue needs and Sub-Nos. 3-11 relating to specific commodities. The report and order of November 25, 1968 is a final report and order disposing of the Sub-No. 2 proceeding. It finds on the entire record, including evidence and briefs, that the general level of rates increased as proposed by the railroads in their X-259 Tariff of Increased Rates and Charges does not exceed a just and reasonable level, reserving for correction in a

later report and order maladjustments as between specific rates but only within the framework of the general bases of rates and charges approved in the report.

VII

The Commission's report and order of January 9, 1969, after reciting that the November 25, 1968 report and order had continued the proceeding for consideration of the lawfulness of the increases "as they applied to specific commodities and services" stated that:

> Our findings as to increased railroad operating costs and revenue need, as set forth and explained therein, are adopted and made part of this report as though fully restated. . .

The only other reference to revenue needs is contained in some broad generalized language in the "Ultimate Conclusions and Findings". Otherwise, the entire report is devoted to a consideration of how the higher level of revenues authorized in the earlier report should be allocated among the various commodities and services. With a few exceptions of no relevance to the issues in this proceeding it authorized the increases as proposed by the railroads.

VIII

The plaintiffs in this action participated as protestants in the proceeding before the Commission through the submission of evidence, briefs and argument. They are either shippers or representatives of shippers who are bearing over 20 percent of the total increases approved by the Commission in *Ex Parte No. 259*.

IX

The Commission's report and order of November 25, 1968 is arbitrary, capricious, without rational basis, an abuse of discretion and otherwise unlawful.

X

The following findings in the report and order of November 25, 1968 are not supported by the requisite subsidiary findings:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, with the exceptions noted in our order, are permitted to become effective at this time.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. This finding,

however is without prejudice to other or different findings to be reached in Sub-Nos. 3-11 in regard to particular rates and charges.

The unnumbered finding that use of 1966 as a base year is "reasonable and fair to shippers".

The unnumbered finding that the railroads' rates of return for the years 1966, 1967, 1968 and for the "constructive year" (Estimated 1968 traffic with last half 1968 expenses annualized) "are clearly inadequate".

XI

The findings referred to in the foregoing paragraph are not supported by substantial probative evidence.

XII

The report and order of November 25, 1968 is also erroneous in the following respects:

(1) It holds erroneously that there is a zone of reasonableness applicable to a general proposed rate level as opposed to the level of specific rates.

(2) It does not make the finding required by the statute that with the additional revenue to be derived from the increased freight rates and charges, the proposed level will provide adequate and efficient railway transportation services at the "lowest level consistent with the furnishing of such service" as required by Section 15a(2) of Title 49 of the United States Code. The record before the Commission will not support such a finding.

(3) It holds erroneously that rate of return is a standard which can properly be applied as a test of the ade-

quacy of respondents' revenues and bases its order in part on findings that the railroads' rates of return for the years 1966, 1967, 1968 and for the "constructive year" are "clearly inadequate".

(4) It fails to give consideration to evidence of disparate financial prospects and revenue needs among the several carriers and carrier groups.

(5) It makes no findings which would provide a basis for ignoring demonstrated differences and treating all railroads and groups of railroads as having like revenue needs.

XIII

The Commission's report and order of January 9, 1969 is arbitrary, capricious, without rational basis, an abuse of discretion and otherwise unlawful.

XIV

The following findings in the report and order of January 9, 1969 are supported neither by the requisite subsidiary findings nor by substantial evidence:

> 1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report . . . [with certain exceptions not relevant to the issue raised by this Amended and Supplemental Complaint]

* * *

13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

XV

The Commission erred in its January 9, 1969 report and order in adopting the findings in the November 25, 1968 report and order "as to increased railroad operating costs and revenue need, as set forth and explained therein".

XVI

The Commission erred in its finding 13 in its January 9, 1969 report and order in using rate of return as a test of whether rates exceed a maximum reasonable level.

XVII

The Commission erred in its November 25, 1968 and January 9, 1969 reports and orders in failing and refusing to require the railroads to present evidence of, and to consider evidence presented by others of, the unit costs of performing transportation services.

XVIII

Unless the relief prayed for herein is granted, plaintiffs will suffer irreparable injury and damage.

WHEREFORE plaintiffs demand

(1) That a three-judge court be convened pursuant to the provisions of Section 2284(1) of Title 28 of the United States Code.

(2) That after hearing before such court judgment be entered enjoining, annulling and setting aside the complaint of Commission order.

(3) That plaintiffs be granted such other and further relief in the premises as justice may require.

Respectfully submitted

ALABAMA POWER COMPANY
GEORGIA POWER COMPANY
GULF POWER COMPANY
SOUTHERN ELECTRIC GENERATING COMPANY

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MILTON A. CARLTON, JR.
William Oliver Building
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HAROLD A. BOWDOIN, JR.
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PROPERTY OWNERS' COMMITTEE

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AMERICAN PAPER INSTITUTE

Arthur L. Winn, Jr.
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Amended Complaint

Southern Paper Manufacturers'
Traffic Conference

J. Raymond Clark
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Tel. 628-2788

Association of Home Appliance
Manufacturers
Gas Appliance Manufacturers
Association, Inc.
Manufacturing Chemists'
Association, Inc.
Steel Shipping Container Institute

Richard J. Hardy
Henri F. Rush, Jr.
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Tel. 298-8151

Troutman, Sams, Schroder & Lockerman
Martin, Balch, Bingham, Hawthorne & Williams
La Roe, Winn & Moerman
Swidler & Berlnap

Of Counsel

Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants

In The

UNITED STATES DISTRICT COURT

For the District of Columbia

[Title Omitted in Printing]

Intervenors as defendants, Aberdeen, and Rockfish Railroad Company, et al. (Exhibit A lists the names of all intervenors) in answer to the amended complaint:

I

Admit the allegations of paragraph I.

II

Admit the allegation of paragraph II that the residence of Property Owners' Committee and the principal office of the Manufacturing Chemists' Association, Inc., are in the District of Columbia and admit that jurisdiction of District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by sections 1336, 1398, 2284 and 2321-2325 of Title 28 of the United States Code; but deny that the Court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and January 9, 1969, 332 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates 1968;* and deny that Sections 701-706 of Title 5 of the United States Code and Rule 23 of the Federal Rules of Civil Procedure apply here.

Railroads' Answer

III

Neither admit nor deny the allegations of paragraph III for the reason that intervenors as defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

IV

Deny each and every allegation of paragraph IV, the purported class not having been defined; there being no question of law and fact common to a class as some shippers took positions before the Interstate Commerce Commission in conflict with the position plaintiffs took before the Commission; the claims of plaintiffs not being typical of the claims of all shippers in the United States, including the shippers that participated before the Commission in *Ex Parte No. 259*; and the objective of plaintiffs in this suit being to deprive the railroads of urgently required revenues, which is contrary to the interest of some shippers who recognize the need of the railroads for additional revenues to provide an efficient transportation system. Intervenors as defendants also deny that there is a risk of inconsistent or varying adjudications, as no other suit has been filed against the Commission orders in *Ex Parte No. 259* and if another suit should be filed in another jurisdiction it is unlikely that the Statutory Three Judge Court in that case would proceed without regard to this case; and further deny that suits to set aside reviewable orders of the Interstate Commerce Commission, which must be brought pursuant to specific statutory authority, are the type of case in which Rule 23 is applicable or appropriate.

V

Admit the allegations of paragraph V.

VI

Admit that on March 11, 1968, the railroads of the United States filed a tariff entitled "Tariff of Increased Rates and Charges X-259" and admit that the Interstate Commerce Commission entered orders in *Ex Parte No. 259* on June 19, 1968; July 3, 1968; and November 25, 1968; but deny that those were the only orders entered in *Ex Parte No. 259;* and deny all other allegations of paragraph VI and refer the Court to the Commission's orders for a complete and accurate statement of their contents.

VII

Admit that the Interstate Commerce Commission entered an order on January 9, 1969; deny all other allegations in paragraph VII; and refer the Court to that Commission order (Amended Complaint, Exhibit 2) for a complete and accurate statement of its contents.

VIII

Admit that plaintiffs participated before the Interstate Commerce Commission in *Ex Parte No. 259;* neither admit nor deny all other allegations of paragraph VIII for the reason that intervenors as defendants are without knowledge or information sufficient to form a belief as to the truth of those allegations.

IX

Deny each and every allegation in paragraphs IX through XVII.

X

Deny the allegation of paragraph XVIII that plaintiffs will suffer irreparable injury and damage unless the orders of the Interstate Commerce Commission in *Ex Parte No. 259* are set aside for the reason that the Commission has clearly provided protection for the rights of all shippers, including plaintiffs, by its finding No. 5 in the order of November 25, 1968, to wit:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act."

and by its finding No. 15 in the order of January 9, 1969, to wit

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in

and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act."

and further deny that plaintiffs are entitled to any relief herein for the reason that they have not exercised the procedures available to them before the Interstate Commerce Commission.

XI

Except as expressly admitted herein, deny each and every allegation in the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE, intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al., pray that the complaint be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

Respectfully submitted,

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Railroads' Answer

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Tel. (202) 737-5900

[Certificate of Service and Exhibit A Omitted in Printing. For a List of Class I Railroads, See Exhibit A to the Railroads' Motion to Intervene, in Part A at P. 13a, Supra.]

Amended and Supplemental Complaint of Intervening Plaintiff, the U. S. Secretary of Agriculture

[Partial]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

I

Intervening plaintiff, the Secretary of Agriculture of the United States, hereinafter referred to as the Secretary, brings this complaint to suspend, enjoin, annul and set aside the orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated November 25, 1968 and January 9, 1969, in a proceeding entitled Ex Parte No. 259—*Increased Freight Rates, 1968.*

II

The Secretary was a party to the proceedings before the Commission out of which the present action arises.

III

The jurisdiction of the Court is founded upon 5 U.S.C. 701-706, sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. 1336, 1398, 2284 and 2321-2325, and section 201 of the Agricultural Adjustment Act of 1938, 7 U.S.C. 1291.

IV

The United States of America is named as a statutory defendant pursuant to section 2322 of the Judicial Code, 28 U.S.C. 2322.

Complaint of Intervenor U. S. Secretary of Agriculture

V

The defendant Commission is an administrative tribunal created by section 11 of the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 379, 383, as amended and supplemented, 49 U.S.C. 11, with specifically vested powers and duties respecting interstate commerce under the said Act and the acts amendatory thereof and supplemental thereto, hereinafter referred to as the Interstate Commerce Act.

VI

The Commission proceeding grew out of a petition filed on March 7, 1968 on behalf of substantially all of the Class I railroads of the United States and others seeking the requisite relief from statutes and regulations administered by the Commission in order that the railroads might publish and, after expedited consideration by the Commission, put into effect, through the vehicle of a master tariff, selective increases in freight rates and charges ranging from three to ten percent. The railroads' petition was granted, over the formal objection of the Secretary, the following day, March 8, 1968.

VII

Pursuant to the authority thus granted, the railroads on March 11, 1968 published master tariff X-259 containing the proposed increases to become effective May 24, 1968. By order dated March 12, 1968, the Commission established the procedure to be followed in the initial stage of the proceeding. Provision was made for the filing of verified statements by the railroads and protestants

on an expedited basis. Oral argument was scheduled to begin on May 16, 1968.

VIII

By order dated April 15, 1968, the Commission revised the schedule established by its order of March 12, 1968, to afford protestants additional time in which to prepare and submit evidence in opposition to the rate increases proposed by the railroads. The railroads voluntarily postponed the effective date of the proposed rate increases until June 24, 1968 and oral argument was rescheduled and held on June 13 and 14, 1968.

IX

On June 19, 1968, the Commission ordered suspended to and including January 23, 1969, the tariff of increased rates and charges X-259. However, the railroads were authorized to establish rate increases of up to three percent subject to maximums no higher than specified in the suspended tariff. The Commission instituted an investigation into and concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended tariff schedules as well as the tariff schedules authorized to be filed.

X

By order dated July 3, 1968 the Commission divided the case into ten sub-numbered proceedings. Pursuant to that order, additional verified statements were filed by both the railroads and protestants and statements theretofore filed were designated by the parties for consideration in the

appropriate sub-numbered proceedings. Hearings for the purpose of cross-examination and rebuttal in each of the proceedings, some of the hearings simultaneous, were held between September 9th and October 8th, 1968. Briefs in all proceedings were due November 12, 1968.

XI

Hearing in the sub-proceeding captioned Sub-No. 2—*Railroad Cost and Revenue Need* began September 9th and was closed September 25, 1968. On September 26, 1968, prior to the closing of hearing in other sub-numbered proceedings, the railroads petitioned the Commission to vacate suspension of master tariff X-259. Several parties, including the Secretary, replied to that petition on or before the due date of October 16, 1968. The Commission had taken no action on the railroad petition on November 12, 1968, when briefs in all sub-numbered proceedings were due. Counsel for the Secretary participated actively at every stage of the proceeding and filed a brief on November 12, 1968 addressed to the matter considered in five of the ten sub-numbered proceedings, including Sub-No. 2, *Railroad Cost and Revenue Need.*

XII

By order dated November 25, 1968, and served November 26, 1968, the Commission granted the aforesaid petition, vacated its order of June 19, 1968 and authorized the railroads to make the increased rates contained in all but two items in master tariff X-259 effective upon not less than one day's notice. The railroads were also authorized to depart from the provisions of section 4 of the Interstate

Commerce Act to the extent necessary to establish and maintain the authorized increases in rates and charges. Counsel for the Secretary appeared before the Honorable Howard F. Corcoran on November 27, 1968 and presented argument in support of plaintiffs' application for a temporary restraining order. That application was denied by Judge Corcoran's order herein, dated November 29, 1968.

XIII

By order dated January 9, 1969, and served January 23, 1969, the Commission adopted the findings as to increased railroad operating costs and revenue need set forth in its report of November 25, 1968, and disposed of the remaining issues of lawfulness of the increased rates and charges as applied to specific commodities and services. With a few exceptions, the order of January 9, 1969 left undisturbed the authority granted to the railroads on November 25, 1968 to make effective the increased rates and charges contained in master tariff X-259. The order of January 9, 1969 also granted the railroads relief from section 4 of the Interstate Commerce Act and from the Commission's tariff rules to permit the establishment of the authorized increases in rates and charges.

XIV

According to the most recent freight commodity statistics, published by the Commission's Bureau of Accounts, farm, food and kindred products accounted in 1967 for sixteen percent of the total tons of carload traffic originated by all Class I railroads in the United States and generated twenty-one percent of the total revenue derived

from such traffic by those railroads. All possible administrative remedies have been exhausted and there is no adequate remedy at law for the plaintiffs herein or for the producers and shippers of agricultural products throughout the United States whose interests will be adversely affected by the aforesaid decisions and orders of the Commission.

XV

The Commission's aforesaid reports and orders of November 25, 1968 and January 9, 1969 are unlawful and in violation of the Interstate Commerce Act, 49 U.S.C. 1 et seq., and 5 U.S.C. 551, et seq., (the former Administrative Procedure Act) insofar as they approved and permitted the selective rate increases contained in tariff X 259 to become effective and to continue in effect. The said reports and orders of the Commission approving the proposed increases and permitting them to become effective are based upon errors of law, are not supported by substantial evidence or adequate findings, exceed the statutory powers of the Commission, are arbitrary, capricious, an abuse of discretion, the product of improper procedures, lacking a rational basis, and are otherwise not in accordance with law. Specifically, and without limiting the generality of the foregoing, the Commission erred, *inter alia*, in the following respects:

1. The following findings are not supported by the requisite subsidiary findings or substantial evidence upon the record as a whole:

a. (t)here is a critical need on the part of the respondent railroads for additional revenue to off-

set, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. (332 I.C.C. at 608 and 790)

b. (t)he public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges . . . are permitted to become effective (332 I.C.C. at 608) and to be continued (332 I.C.C. at 790)

c. (w)ithout the additional revenue to be derived from the increased freight rates and charges authorized herein the earnings of respondents would be insufficient to enable them under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy. (332 I.C.C. at 609 and 790)

d. (t)he increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. (332 I.C.C. at 609 and 792)

e. the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost and consistent with the furnishing of such service. (332 I.C.C. at 792)

f. the shipping public in general is reasonably protected by the automatic refund provision and the other remedial provisions of the act (332 I.C.C. at 609)

g. withholding of the authority would result in irreparable injury to respondents and would be contrary to the public interest (332 I.C.C. at 609)

h. the contemplated rate level would have no material adverse effect on the movement of traffic (332 I.C.C. at 608)

i. the rates of return of the railroads for 1966, 1967, 1968 and the constructive year are clearly inadequate (332 I.C.C. at 603)

j. the unit cost data computed by the railroads are substantially accurate (332 I.C.C. at 598)

k. the data concerning increased wage expenses adduced by the railroads are substantially accurate in all material respects (332 I.C.C. at 599)

l. use of 1966 as a base year is reasonable, and fair to shippers (332 I.C.C. at 599)

2. The Commission also erred in:

a. failing to find in its report of November 25, 1968 that the revenues generated by the increased rates and charges were required in order for the railroads to provide adequate and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service* as required by

section 15a(2) of the Interstate Commerce Act, 49 U.S.C. 15a(2).

b. failing to find that the railroads did not sustain their statutory burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), of proving the increased rates and charges just and reasonable.

c. failing to find that the railroads have established a special case and that the rates are reasonably compensatory as required by section 4(1) of the Interstate Commerce Act, 49 U.S.C. 4(1).

d. failing to adhere to the national transportation policy of the Congress, 49 U.S.C., note preceding section 1, to promote safe, adequate, economical, and efficient service and to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages.

e. adopting in its report of January 9, 1969 its findings as to increased railroad operating costs and revenue need, as set forth in its report of November 25, 1968. (332 I.C.C. at 714)

f. failing to analyze costs of providing the various services to which the increased rates and charges apply and thus failing to fairly and rationally apportion the burden of supplying railroad revenues among the nation's shippers.

g. failing to exclude from the record cost and other data sponsored by witnesses who had not

prepared the data and were unable to testify to its accuracy.

h. failing to require the railroads to adduce meaningful cost and revenue data against which to test their alleged need for increased revenue.

i. failing to require the railroads to meet the new standard of proof announced in its final report in Ex Parte No. 256, *Increased Freight Rates, 1967* of making "a more complete disclosure of the facts upon which they rely in support of the relief sought." (332 I.C.C. 280, 286)

j. failing to indicate the method and criteria used when it checked the unit cost data of the railroads and found them substantially accurate. (332 I.C.C. at 598)

k. failing to indicate the method and criteria used when it checked the railroads' wage data and found them substantially accurate in all material respects. (332 I.C.C. at 599)

l. relying upon the territorial and national average cost projections submitted by the railroads without analyzing these data.

m. excluding evidence offered by protestants reflecting acceptance of railroad stocks by the financial community.

n. denying the motion of the Secretary to make the Commission's Bureau of Accounts a party to the

proceeding for the purpose of assisting in developing the record in the public interest.

o. denying the Secretary's petitions for orders requiring the railroads to adduce data against which their cost and revenue projections and opinions as to effect of the increased rates upon the movement of traffic might be tested.

p. relying upon the rate of return as an indicator of the reasonableness of the increased rates and charges.

q. considering the question of railroad cost and revenue need entirely apart from the other factors which it is required to consider in determining the justness and reasonableness of the increased rates and charges.

r. holding simultaneous hearings upon the various aspects of the proceeding and thus denying protestants a fair opportunity to test the allegations of the railroad witnesses by cross-examination.

WHEREFORE, the Secretary, as intervening plaintiff prays:

1. That this Court suspend, enjoin, annul and set aside the reports and orders of the Commission complained of herein, and

2. That the Secretary be granted such other and further relief in the premises as justice may require and as may be deemed by this Court fit and proper.

Complaint of Intervenor U. S. Secretary of Agriculture

Respectfully submitted by direction of the Secretary of Agriculture of the United States.

HAROLD M. CARTER
Acting Assistant General Counsel

WILLIAM A. IMHOF
Attorney
Office of the General Counsel
United States Department of Agriculture
Washington, D. C. 20250

Answer of the Interstate Commerce Commission

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Defendant, the Interstate Commerce Commission, answers the amended and supplemental complaint as follows:

I.

Admits the allegations of Paragraph I.

II.

With respect to the allegations of Paragraph II, (1) admits that the residence of the plaintiff Property Owners' Committee and the principal office of the plaintiff Manufacturing Chemists' Association, Inc. are in the District of Columbia, (2) admits that Sections 1336, 2284, and 2321-2325 of Title 28 of the United States Code govern actions to set aside certain orders of the Commission and for the purposes of this action expressly waive the defense, suggested by *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495-6 (E.D. Va. 1935), that these sections do not confer jurisdiction over the permissive orders entered by the Commission on November 25, 1968, and January 9, 1969, in *Ex Parte 259, Increased Freight Rates, 1968*, and (3) denies that Sections 701-706 of Title 5 of the United States Code and Rule 23 of the Federal Rules of Civil Procedure apply to this proceeding.

I.C.C.'s Answer

III.

Admits the allegations of Paragraph III.

IV.

Denies the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Admits the allegations of Paragraph VI except deny that the order of November 25, 1968, is a final order of the Commission and respectfully refer the Court to the Commission's orders for a true and complete statement of their contents.

VII.

With respect to the allegations of Paragraph VII, admits that the Commission entered a report on January 9, 1969, that referred to and adopted the report of November 25, 1968, but respectfully refer the Court to this order for a true and complete statement of its contents and otherwise deny the remaining allegations.

VIII.

With respect to the allegations of Paragraph VIII, admits that plaintiffs are shippers or representatives of shippers who participated in *Ex Parte 259* before the Commission as protestants but otherwise neither admits nor denies the remaining allegations for the reason that defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

IX.

Denies the allegations of Paragraphs IX through XVII, inclusive.

X.

With respect to the allegations of Paragraph XVIII, denies that plaintiffs will suffer irreparable injury or damage if not granted the relief sought herein and further deny that plaintiffs are entitled to any relief since they have failed to exhaust the adequate remedies available to them before the Commission pursuant to 49 U.S.C. 13.

XI.

In further answer to the complaint, denies that the actions of the Commission here challenged are unlawful or improper for any reason whatever and aver that the Commission's actions were lawful and proper in all respects.

WHEREFORE, defendant, the Interstate Commerce Commission, prays that the complaint be dismissed and the relief sought be denied.

ARTHUR J. CERRA
Associate General Counsel

ROBERT W. GINNANE
General Counsel

PHILIP W. GWITS
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Interstate Commerce
Commission
Washington, D. C. 20423

Attorneys for the Interstate Commerce Commission

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of the United States of America

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

The United States of America, a defendant in the above case, in answer to the amended and supplemented complaint and intervening complaint neither admits nor denies the allegations thereof. The United States of America neither supports nor opposes the order of the Commission.

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RICHARD W. MCLAREN
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Washington, D. C. 20001

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of Aberdeen and Rockfish Railroad Company, et al. Intervenors as Defendants, To Complaint of Intervening Plaintiff

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al, in answer to supplemental and amended complaint of intervening plaintiff, The Department of Agriculture:

I

Admit the allegations of Paragraphs I and II.

II

Admit the allegation of Paragraph III that jurisdiction of District Courts in suits to set aside some orders of the Interstate Commerce Commission is conferred by Sections 1336, 1398, 2284 and 2231-2325, inclusive, of Title 28 of the United States Code, but deny that the court has jurisdiction over the permissive orders entered November 25, 1968, 332 ICC 590, and on January 9, 1969, 333 ICC 714, in the proceeding entitled *Ex Parte No. 259, Increased Freight Rates, 1968*, and deny each and every other allegation of Paragraph III.

Railroads' Answer to Intervenor's Complaint

III

Admit the allegations of Paragraphs IV through XII, inclusive, and respectfully refer this court to all orders and documents referred to therein for a complete and accurate statement of their contents and respectfully refer this court to the entire record before the Interstate Commerce Commission for a full and complete description of the Commission procedures in *Ex Parte No. 259.*

IV

Admit that the Interstate Commerce Commission entered an order on November 25, 1968, and respectfully refer this Court to that order for a complete and accurate statement of its contents, and deny each and every other allegation of Paragraph XIII.

V

Deny the allegations of Paragraphs XIV and XV and every sub-paragraph thereof.

VI

Except as expressly admitted herein, deny each and every allegation of the complaint and deny that the actions of the Interstate Commerce Commission are unlawful in any respect.

WHEREFORE, intervenors as defendants, Aberdeen and Rockfish Railroad Company, et al, pray that the complaint

be dismissed with cost to the plaintiffs and pray that the relief sought be denied.

Respectfully submitted,

EDWARD A. KAIER

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Answer of the Interstate Commerce Commission to Amended and Supplemental Complaint of Intervening Plaintiff

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Defendant, the Interstate Commerce Commission, answers the amended and supplemental complaint of intervening plaintiff, the Department of Agriculture, as follows:

I.

Admits the allegations of Paragraphs I and II.

II.

With respect to the allegations of Paragraph III, admits that 7 U.S.C. 1291 authorizes the Secretary of Agriculture to bring suits and that 28 U.S.C. 1336, 1398, 2284, 2321 to 2325 and 5 U.S.C. 703 govern actions to set aside certain orders of the Interstate Commerce Commission and for the purposes of this action expressly waives the defense, suggested by *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495-6 (E.D. Va. 1935), that these actions do not confer jurisdiction over the Commission's orders of November 25, 1968, and January 9, 1969, in *Ex Parte 259, Increased Freight Rates, 1968.*

III.

Admits the allegations of Paragraphs IV through XIII, inclusive, and respectfully refers this Court to all orders and other documents referred to therein for complete and accurate statement of their contents.

IV.

Admits that the Commission's Bureau of Accounts publishes certain freight commodity statistics but respectfully refers the Court to these publications for a complete and accurate statement of their contents; otherwise denies the allegations of Paragraph XIV.

V.

Denies the allegations of Paragraph XV and every subparagraph thereof.

VI.

In further answer to the amended and supplemental complaint, denies that the actions of the Commission here challenged are unlawful or improper for any reason whatever and aver that the Commission's actions were lawful and proper in all respects.

WHEREFORE, defendant, the Interstate Commerce Commission, prays that the relief sought be denied and the complaint be dismissed.

ROBERT W. GINNANE
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ARTHUR J. CERRA (PWG)
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PHILIP W. GETTS
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Attorneys for the Interstate Commerce Commission

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALABAMA POWER COMPANY, ET AL., *Plaintiffs*,
v.
UNITED STATES OF AMERICA, ET AL., *Defendants*.
Civil Action No. 2970-68

CORCORAN, *District Judge*: This action was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in *Ex Parte No. 259, Increased Freight Rates, 1968.*[1] These orders permitted Class I railroads of the United States to effect a general increase in their freight rates and charges to offset the increase in expenses which had occurred in the 1967-1968 period.

The Secretary of Agriculture intervened as a party plaintiff and several Class I railroads intervened as party defendants.

In substance the plaintiff shippers contend that the ultimate findings of the Commission as to the need for increased railroad revenue were not based upon adequate subsidiary findings and were not supported by substantial evidence on the record since the Commission failed to determine,

> "how much revenue the railroads would need: (1) for operating expenses, rents and taxes; (2) for capital improvements including (a) the revenues needed to pay for improvements to be financed by

1. 332 I.C.C. 714.

> internally generated funds, and (b) the additional revenues needed to enable them to obtain the funds required for externally financed improvements; and (3) the amounts needed for debt service and dividends. It should also have looked at and determined the railroads' future needs and not simply their present requirements:"[2]

The plaintiffs further contend that the Commission ignored the differences in the financial needs of the railroads in the three railroad districts and failed to require the railroads to present evidence of the unit cost of performing transportation services.

The intervening Secretary of Agriculture argued that the Commission did not hold the railroads to the recently announced new standard of proof which it had expressed in *Ex Parte No. 256, Increased Freight Rates, 1967*,[3] and further that the Commission did not consider the effect of the rate increases upon the movement of traffic.

The defendant railroads submitted that the orders of the Commission, being permissive general increase orders, were non-reviewable, relying on *Algoma Coal and Coke Co.* v. *United States*.[4] They further submitted that even if the orders were held to be reviewable, the I.C.C. had observed the required statutory standards and the orders of the Commission had contained adequate findings supported by substantial evidence.

The I.C.C. did not join in the jurisdictional objection proffered by the railroads but chose to defend its action on the merits, contending that it had made the requisite

2. Plfs. Brief p. 18.

3. 332 I.C.C. 285.

4. 11 F. Supp. 487 (E.D. Va. 1935) (hereinafter referred to as *Algoma*) and related cases, *infra*.

findings which were supported by substantial evidence.

The Court concludes that it lacks jurisdiction to review the questioned Commission orders, and that it is unnecessary, therefore, to reach the issues raised by the plaintiff shippers and the intervening Secretary of Agriculture.

It is to be noted that the rates which have become effective under the I.C.C. orders are permissive and not mandatory, and that the Commission in its Ultimate Conclusions and Findings in *Ex Parte 259* declared in No. 15:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 792.

The foregoing declaration assures any aggrieved party, such as the plaintiffs herein, the opportunity to challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act, 49 U.S.C.A. §13.

Under such circumstances it is the Court's opinion that this case should be governed by *Algoma*[5]. In that case District Judge Chesnut, writing for a three-Judge court[6], noted:

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5. *Supra* Note 4, 11 F. Supp. at 493-494.

6. Circuit Judge Soper and District Judge Way sat with Judge Chesnut.

"The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact.

• • • • • •

"[T]his misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (49 USCA §13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates."

The factual and legal questions considered in *Algoma* are identical with those raised in the present proceeding; and, in the opinion of the Court, *Algoma* represents the applicable law.[7]

Accordingly, the complaint is dismissed.

EDWARD A. TAMM,
Circuit Judge

HOWARD F. CORCORAN,
District Judge

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7. *Algoma's* position that the court will not entertain a suit to enjoin the Commission's orders in a general revenue proceeding where section 13's remedy has not yet been exhausted has been followed in *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd.* 352 U.S. 1021 (1957); *Atlantic City Electric Co.* v. *United States*, S.D.N.Y., F. Supp. (No. 69 Civ. 800, October 28, 1969).

Judge Wright's Dissent

Wright, Circuit Judge, dissenting: It is improper, in my judgment, to dismiss this suit at this time. Instead, I think we ought to examine the order now and decide whether the Commission's action was supported by substantial evidence. I am in complete agreement with the proposition that any plaintiff who wants to challenge any rate now being charged must first pursue his administrative remedies under Sections 13 and 15 of the Act. However, the plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers. That order was predicated on a factual determination by the Commission that the nation's railroads need more freight revenue. That order, like any action of the Commission, must be based on substantial evidence. *Cf. United States* v. *Louisiana*, 290 U.S. 70, 77 (1933). Such an order is, of course, judicially reviewable, 28 U.S.C. §§1336, 2325 (1964), and I feel it is ripe for review now.

There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. Shippers, therefore, are paying higher rates now as a direct result of this Commission determination. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Considering challenges to the general order now would avoid needless relitigation of the same issue before the

Commission in countless rate-making proceedings involving individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset, preferably, as plaintiffs here seek to do, in a class action.

I admit that there is little direct language in the existing cases supporting judicial review of the order now. Review now does seem eminently sensible to me, however, in spite of the fact that *Atlantic City*[1] seems to preclude it. Furthermore, both the *Algoma*[2] and the *Florida Citrus*[3] cases can be read as sanctioning this limited, threshold review. After holding that the plaintiffs could not challenge individual carrier-set rates until they were passed upon by the Commission, both courts did consider the propriety of the general order entered by the Commission. Both concluded that the general order was supported by substantial evidence. Consequently, neither of these cases,

1. *Atlantic City Electric Co.* v. *United States*, S.D. N.Y., F. Supp. (No. 69 Civ. 800, October 28, 1969).

2. *Algoma Coal & Coke Co.* v. *United States*, E.D. Va., 11 F. Supp. 487, 494-495 (1935).

3. *Florida Citrus Comm'n* v. *United States*, N.D. Fla., 141 F. Supp. 517, 524-527 (1956), *aff'd.* 352 U.S. 1021 (1957).

in my judgment, supports the disposition made here or in *Atlantic City*.[4]

I respectfully dissent.

J. SKELLY WRIGHT
Circuit Judge

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4. It is not inconsistent to hold that individual rates must be first challenged before the Commission, but at the same time to permit judicial review of the propriety of the general order. Two different determinations are made by the Commission. In the first proceeding, which leads to the general order permitting the carriers to raise rates, the Commission determines that the railroads need more revenue. That order will stand if the court finds that it is based on substantial evidence. *Florida Citrus Comm'n* v. *United States*, *supra* Note 3, 144 F. Supp. at 524-527; *Algoma Coal & Coke Co.* v. *United States*, *supra* Note 2, 11 F. Supp. at 494-495. In the second proceeding, the Commission has to determine the reasonableness of individual rates. That determination, too, is subject to judicial scrutiny. 28 U.S.C. §1336 (1964); see *Swift & Co.* v. *United States*, 343 U.S. 373 (1952).

Judgment

In The

United States District Court

For the District of Columbia

Civil Action
No. 2970-68

Alabama Power Company, et al.,
Plaintiffs,

v.

United States of America

and

Interstate Commerce Commission,
Defendants.

The above-entitled cause having come on before this duly constituted Court of three judges, and the Court having considered the pleadings, briefs and oral argument of all counsel and having entered its opinion herein on December 3, 1969, it is hereby:

Ordered, that the relief prayed for in the complaints be, and it is hereby, denied in conformity with the reasons specified in our opinion entered herein on December 3, 1969, and the complaints be, and they are hereby, dismissed.

Dated this 18th day of December, 1969.

Edward A. Tamm
United States Circuit Judge

Howard F. Corcoran
United States District Judge

Notice of Appeal to the Supreme Court of the United States

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[TITLE OMITTED IN PRINTING]

Notice is hereby given that Alabama Power Company, American Paper Institute, Association of Home Appliance Manufacturers, Gas Appliance Manufacturers Association, Inc., Georgia Power Company, Gulf Power Company, Manufacturing Chemists' Association, Inc., Property Owners' Committee, Southern Electric Generating Company, Southern Paper Manufacturers Traffic Conference and Steel Shipping Container Institute, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on December 18, 1969.

This appeal is taken pursuant to 28 U.S.C. §1253.

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GEORGIA POWER COMPANY
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Notice of Appeal to the Supreme Court of the United States

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Of Counsel

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ORDER NOTING PROBABLE JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL.,

Appellants,

v.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 1083 and a total of one and one half hours is allotted for oral argument.

May 18, 1970

Mr. Justice Douglas took no part in the consideration or decision of this order.